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# **NAVAL POSTGRADUATE SCHOOL**

**MONTEREY, CALIFORNIA**

## **THESIS**

**LEGAL RESPONSES TO TERRORISM: CASE STUDY OF  
THE REPUBLIC OF KENYA**

by

Charles Lenjo Mwazighe

December 2012

Thesis Co-Advisors:

Thomas C. Bruneau  
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**LEGAL RESPONSES TO TERRORISM: CASE STUDY OF THE REPUBLIC OF  
KENYA**

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Submitted in partial fulfillment of the  
requirements for the degree of

**MASTER OF ARTS IN SECURITY STUDIES  
(COMBATING TERRORISM: POLICY & STRATEGY)**

from the

**NAVAL POSTGRADUATE SCHOOL  
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## **ABSTRACT**

Terrorism remains a major threat to Kenya's national-security interests. However, efforts to combat the menace are hampered by an insufficient legal framework. Previously, terrorism-related offenses were primarily handled under the provisions of the penal code, with the result that offenders received lenient sentences or even were acquitted. On the other hand, efforts to formulate specific counterterrorism legislation in the past were met with criticism from human-rights bodies, the clergy, legal bodies, and the public at large.

This thesis examines the development of counterterrorism legislation in the Republic of Kenya. It evaluates the sufficiency of the criminal-justice system, the British legal response to counterterrorism as a basis for comparison, and current counterterrorism legislation. The 2012 Prevention of Terrorism Act marks a great improvement, especially in safeguards to the rights of persons and entities. The act, however, still leaves open the definition of terrorism and the appeals process for the proscription of entities. This thesis recommends further refinement of these clauses and the establishment of stricter rules, vesting power under the president and prime minister (similar to the U.K.) with cabinet approval.



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## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>A.</b>	<b>OVERVIEW AND ORGANIZATION.....</b>	<b>2</b>
<b>B.</b>	<b>THE SHAPE OF TERRORISM IN KENYA.....</b>	<b>3</b>
<b>C.</b>	<b>PROBLEMS WITH PROPOSED AND EXISTING LEGISLATION.....</b>	<b>5</b>
<b>D.</b>	<b>THOUGHTS ON TERRORISM AND LEGAL RESPONSE .....</b>	<b>8</b>
<b>II.</b>	<b>ANALYSIS OF THE CRIMINAL-JUSTICE SYSTEM IN KENYA.....</b>	<b>11</b>
<b>A.</b>	<b>THOUGHTS ON TERRORISM AND CRIMINAL JUSTICE .....</b>	<b>11</b>
<b>B.</b>	<b>THE CRIMINAL-JUSTICE SYSTEM IN KENYA .....</b>	<b>14</b>
1.	Policing.....	15
2.	Prosecution .....	16
3.	The Legal Framework .....	18
<b>C.</b>	<b>OTHER DEFICIENCIES .....</b>	<b>21</b>
1.	Provisions.....	21
2.	No Anticipatory Crimes .....	22
3.	No Reward System.....	22
4.	No Anticipatory Criminal Investigation .....	22
<b>D.</b>	<b>CRIMINAL JUSTICE AND TERRORISM .....</b>	<b>23</b>
1.	Law Enforcement.....	23
a.	<i>Investigation .....</i>	<i>23</i>
b.	<i>Information Gathering .....</i>	<i>24</i>
c.	<i>Arrest and Detention.....</i>	<i>25</i>
d.	<i>Interrogation of Terror Suspects.....</i>	<i>26</i>
2.	Legal Representation and Assistance.....	26
<b>E.</b>	<b>CONCLUSION .....</b>	<b>27</b>
<b>III.</b>	<b>THE UNITED KINGDOM’S LEGAL RESPONSE TO TERRORISM.....</b>	<b>29</b>
<b>A.</b>	<b>LEGISLATIVE MEASURES AND THE IRISH PROBLEM.....</b>	<b>30</b>
a.	<i>1939 Emergency Powers (Defense) Act .....</i>	<i>31</i>
b.	<i>1973 Northern Ireland (Emergency Provisions) Act</i> <i>(EPA).....</i>	<i>31</i>
c.	<i>The 1974 Prevention of Terrorism Act.....</i>	<i>32</i>
d.	<i>1998 Criminal justice (Terrorism and Conspiracy) Act .....</i>	<i>33</i>
e.	<i>Human Rights Act of 1998 .....</i>	<i>34</i>
f.	<i>Terrorism Act (TA) 2000.....</i>	<i>34</i>
<b>B.</b>	<b>THE COURTS WEIGH IN .....</b>	<b>38</b>
1.	Detention at Ports and Airports .....	39
2.	Shoot-to-Kill Policy .....	41
3.	Internment and Special Powers.....	43
4.	Right to Silence.....	43
<b>C.</b>	<b>SPECIAL POWERS (PROSECUTORIAL MEASURES IN</b> <b>NORTHERN IRELAND).....</b>	<b>45</b>
1.	Diplock Courts .....	45

2.	Supergrass Trials in Northern Ireland .....	46
D.	SPECIAL POWERS (LAW-ENFORCEMENT MEASURES).....	47
1.	Stop and Search.....	47
2.	Detention and Wider Powers of Arrest.....	47
3.	Internment and Interrogations.....	49
4.	Proscription .....	49
E.	REPEAL OF THE NORTHERN IRELAND EMERGENCY PROVISIONAL ACT 1978.....	51
F.	CONCLUSION .....	52
IV.	TERRORISM LEGISLATION IN KENYA .....	55
A.	BACKGROUND .....	55
B.	THE SUPPRESSION OF TERRORISM BILL 2003.....	58
1.	Definition of Terrorism .....	59
2.	Terrorism offences .....	62
3.	Declared Terrorist Organizations .....	62
4.	Law-Enforcement Powers .....	64
a.	<i>Powers of Search and Seizure</i> .....	64
b.	<i>Incommunicado Detention</i> .....	66
c.	<i>Immunity of Law Enforcement</i> .....	68
d.	<i>Extradition</i> .....	69
5.	Freedom of information and Expression .....	69
C.	ANALYSIS OF THE PREVENTION OF TERRORISM ACT 2012 .....	71
1.	Definition of Terrorism .....	73
2.	Terrorism Offences and Sentencing.....	75
3.	Declared Terrorist Organizations (Specified Entity) .....	76
4.	Law-enforcement powers .....	78
a.	<i>Seizure of Property</i> .....	78
b.	<i>Powers of Police Officers</i> .....	79
c.	<i>Detention (Remand) and Right to be Released</i> .....	80
5.	Terrorism Financing.....	81
6.	Communications Interception .....	82
7.	Fundamental Rights in relation to the constitution of Kenya.....	83
D.	CONCLUSION .....	84
V.	CONCLUSION AND RECOMMENDATIONS.....	87
	LIST OF REFERENCES.....	91
	INITIAL DISTRIBUTION LIST .....	99

## **LIST OF ACRONYMS AND ABBREVIATIONS**

ACHPR	African Charter on Human and People Rights
AG	Attorney General
AP	Administration Police
APA	Administration Police Act
ATCSA	Anti Terrorism Crime and Security Act
AU	African Union
CPC	Criminal Procedure Code
DPP	Director of Public Prosecution
EALS	East African Law Society
ECHR	European Convention for Human Rights
ECtHR	European Court for Human Rights
EEC	European Economic Community
EPA	Emergency Provision Act
EU	European Union
FATF	Financial Action Task Force
ICCPR	International Covenant on Civil and Political Rights
IGAD	Intergovernmental Authority on Development
IRA	Irish Republican Army
KDF	Kenya Defense Forces
KP	Kenya Police
LeT	Lashkare Tayyahah
NSIS	National Security Intelligence Service
OHCHR	United Nations High Commissioner for Human Rights
PACE	Police and Criminal Evidence Act
PC	Penal Code
PKK	Kurdistan Workers Party
PLO	Palestine Liberation Organization
PMOI	Peoples Mujahidin of Iran
POAC	Proscribed Organizations Appeal Commission
SAS	Special Air Service

TFG	Transitional Federal Government
UN	United Nations
UNODOC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
USAPATRIOT	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism

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## I. INTRODUCTION

Terrorism is a reality that has left many countries, including Kenya, counting losses. The Republic of Kenya, and indeed all of Africa, is no exception to the worldwide increase in terrorism because there is a favorable environment that permits terrorist operations, including porous borders, internal conflicts, a propensity to failed states, lax financial systems, poverty, corruption, and sociocultural diversity. Statistics for 2007 indicate that “Africa recorded 6,177 casualties from 296 terrorist acts, hence making it the continent with the second highest number of casualties after Asia.”<sup>1,2</sup> The highest number of casualties—5,379 in 1998—came as a result of the bombings in Kenya and Tanzania.<sup>2</sup>

Future terrorist threats to Kenya are as likely as they have been in the past, especially with the military involved in war in the failed state of Somalia. Hence the need to put in place preventive and mitigative measures to counter the effects of terrorist activities—and the need to examine the legal response to terrorism in the context of legislation and policies, to contribute to developing a theoretical and practical approach to understanding and dealing with terrorism in the horn of Africa.

Civil society and watchdog groups have raised the alarm about Kenya’s antiterrorism legislation, especially on human-rights grounds. Various observers, domestically and abroad, have accused the security forces of heavy handedness in the interrogation of terror detainees. Amnesty International accused the government of torture, detaining persons without charge, and harassment of families of people suspected of terrorism.<sup>3</sup> Kefa Otiso argues that the war on terrorism “should not be

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<sup>1</sup> Understanding Terrorism in Africa: In Search for an African voice, ed. Wafula Okumu and Anneli Botha, (Pretoria, Institute for Security Studies, 2007), 27, accessed July 10, 2012, <http://www.issafrica.org/uploads/AFRITERRO071106.PDF>.

<sup>2</sup> Ibid.

<sup>3</sup> Amnesty International Report, “Kenya: The Impact of ‘Anti-Terrorism’ Operations on Human Rights,” March 23, 2005, accessed August 14, 2012, <http://www.amnesty.org/en/library/info/AFR32/002/2005>.



used as a pretext to wantonly violate the basic rights of Kenyans.”<sup>4</sup> He notes that the war can only be won through cooperation with citizens.

The broader question here—of balancing national security with civil liberties—is just as prevalent and pressing in the developed world. At the international level, the threat of terrorism is similar, and calls for regional efforts to counter the threat. This thesis will analyze successful counterterrorism approaches adopted by the U.K in order to provide a working basis for legal experts within the Republic of Kenya. In addition, it will compare the progress made in Kenya to that of the U.K.

## **A. OVERVIEW AND ORGANIZATION**

This thesis is organized into five chapters. Chapter II analyses the current criminal justice system in Kenya to establish whether it is sufficient to deal with international terrorism. The aim of this chapter is to determine whether the existing criminal justice system can be utilised or enhanced without implementing other legislation.

Chapter III will look briefly at the United Kingdom’s legal approach to terrorism since 1969.

Chapter IV will look at the Republic of Kenya’s experience with terrorism and the law, from the roots of Kenyan counterterrorism in 1952—when the British declared a state of emergency in Kenya and branded the Mau Mau freedom fighters as terrorists—to the most recent Al Shabaab attacks. The chapter analyzes the Suppression of Terrorism Bill 2003 and Prevention of Terrorism Act 2012 to point out controversial clauses and probable effects in the country’s criminal justice system. The compatibility of these bills with civil liberties is also investigated.

Chapter V concludes that the Republic of Kenya’s legal response to terrorism is still in its infancy, as in many other African states. Legislation was hurriedly passed, with little input from key civil-society groups and without thorough public debate. This body of law is bound to be shaped by the courts (over a long time), due to the amount of

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<sup>4</sup> Kefa Otiso, “Kenya in the Crosshairs of Global Terrorism: Fighting Terrorism at the Periphery,” *Kenya Studies Review*, vol 1, no. 1, (2009): 128.

litigation that will emerge, challenging sentences and illegal actions by law-enforcement officers that defy the constitution. This thesis will recommend that controversial clauses be changed, and that those that cannot be held as special powers (similar to those in the U.K) that can be activated by either the president or prime minister subject, to judicial approval.

## **B. THE SHAPE OF TERRORISM IN KENYA**

Kenya has suffered three major international terrorist attacks in the recent past.

**The Norfolk Hotel:** On New Year's Eve 1980, Kenya witnessed its first major terrorist attack. The Norfolk Hotel, in the capital city, Nairobi, was bombed, leaving twenty dead and eighteen injured. Investigations revealed that the Palestinian Liberation Organization (PLO) was involved. The group was retaliating for Kenya's assistance to Israel during the 1976 hijacking of an aircraft to Uganda.<sup>5</sup>

**The U.S. Embassy in Kenya:** On 7 August 1998, the U.S. Embassy in Nairobi was bombed.<sup>6</sup> This attack claimed more than 214 lives (including 44 Americans and Kenyan employees in the embassy); more than 5,000 people were injured.<sup>7</sup>

**The Paradise Hotel–Kikambala:** In Mombasa, a terrorist attack destroyed part of the Paradise Hotel, following a bomb blast on 28 November 2002. Fifteen people were killed in the Israeli-owned hotel.<sup>8</sup>

Although the primary targets of the attacks were U.S. and Israeli citizens and properties, the consequences of these attacks were catastrophic for Kenya as well—on many levels. According to the Daily Nation Newspaper, the attacks had “grave economic,

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<sup>5</sup> Raymond Muhula, “Kenya and the Global War on Terrorism: Searching for a New Role in a New War,” in *Africa and the War on Terrorism*, ed. John Davis (Burlington, VT: Ashgate Publishing Company, 2007) 48.

<sup>6</sup> Johnnie Carson, “Kenya: The Struggle Against Terrorism,” in *Battling Terrorism in the Horn of Africa*, ed. Robert I. Rotberg (Washington, D.C.: Brookings Institution Press, 2005), 180.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

political, and social implications.”<sup>9</sup> The United States, Germany, and the U.K. issued travel advisories that paralyzed the tourism sector in 2003, recording a loss of \$14 million a week (tourism employs more than half a million people in Kenya and represents 15 percent of the country’s foreign-exchange earnings.) Foreign tourists cancelled their visits to Kenya’s sunny beaches in Mombasa, Malindi, and Lamu and to renowned safari destinations—Masai Mara, Tsavo, and Samburu. In 1996, Kenya attracted one million tourists, but after the advisories, the numbers declined drastically, thereby affecting the whole economy.<sup>10</sup>

A marked shift in policy after the 2002 bombings saw the government establish mechanisms to meet this growing terrorist threat. The country sought to formulate a national strategy to counter terrorism. The minister of justice and constitutional affairs tabled the Suppression of Terrorism Bill 2003 (Supplement No. 38 of the Kenya Gazette) in Parliament. The bill immediately stirred up controversy, as had the acts that prompted it. The bill was further criticized by the Law Society of Kenya and the clergy, who claimed it violated the country’s constitution and legalized civil-liberties violations—“in particular, freedom of association, the presumption of innocence, right to a fair trial, and particularly targeting Kenyan Muslims as terrorists.”<sup>11</sup> The Law Society of Kenya and civil society and watchdog groups organized protests across the country, sensitizing Kenyans to the negative clauses of the bill. Ultimately, the 2003 bill lapsed after parliament was prorogued, and failed the second reading. In 2006, another antiterrorism bill was proposed, but never made it to parliament.<sup>12</sup>

In mid-October 2011, Kenya deployed its defense force in Somalia in retaliation for the abduction and murder of two British tourists in the coastal town of Lamu by Al

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<sup>9</sup> K. J. Kelley, Kenya Seeks 30 billion from U.S., *The Daily Nation Newspaper*, (Thursday, June 26, 2003) in Kefa Otiso, “Kenya in the Crosshairs of Global Terrorism: Fighting Terrorism at the Periphery,” *Kenya Studies Review*, Vol 1, no.1 (2009),117–119.

<sup>10</sup> Marc Lacey, “Threat of Terrorism Hurts Kenya Tourism,” *New York Times*, January 4, 2004, accessed August 16, 2012, <http://search.proquest.com/docview/432633287?accountid=12702>.

<sup>11</sup> Carolyn Wanjiru Kamau, “Kenya & the War on Terrorism,” *Review of African Political Economy*, vol. 33, no. 107 (2006), 133–141, accessed August 16, 2012, <http://www.jstor.org/stable/4007116>

<sup>12</sup> The anti-terrorism bill 2006 was proposed and immediately rejected by the civil society and human rights organizations even before being formally introduced to Parliament. Some organizations rejected invitations to discuss the bill because they were not involved in writing the document.

Shabaab militia.<sup>13</sup> The Al Qaeda-linked terrorist group has since launched a series of terror attacks in the country. In September 2012, the minister of justice and constitutional affairs introduced the Prevention of Terrorism bill, which was again met with stiff resistance from the same quarters—before being passed hurriedly by the parliament.

Given the current susceptibility of Kenya to terrorist attack, it might be expected that a terrorism bill would be introduced, subjected to rigorous public debate, and passed without hesitation. Instead, all attempts have been rejected by a broad cross-section of Kenyan society, civil-rights bodies, and religious organizations. In the face of deadly threat—much of which is not, in the first instance, a homegrown matter—Kenya must find the right balance, implementing antiterrorism strategies amid fears of violating human rights and damaging Kenyan democracy. Therefore, this thesis asks, what is the appropriate legal response that will legitimate antiterrorist measures, amid civil-liberties concerns? Specifically, why has there been resistance to counterterrorism legislation in Kenya despite the purported “good intentions” of the law?

### **C. PROBLEMS WITH PROPOSED AND EXISTING LEGISLATION**

Following the publication of the 2003 bill, the East African Law Society (EALS) issued a statement querying the necessity of such legislation. It argued that the crimes proposed under the bill are not new and are already addressed under the penal code. On one hand, EALS argues that the bill proposes lesser punishments for serious offenses than are currently prescribed—for instance, the current penalty for murder under the penal code is death, while the most serious offense under the bill would entail “a maximum penalty of ten years’ imprisonment.”<sup>14</sup>

On the other hand, EALS condemned the definition of terrorism in the bill as “so absurdly wide as to mean anything and would in its current form include domestic

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<sup>13</sup> Alphonse Gari, “Briton Killed, Wife Kidnapped by Al Shabaab at Village in Lamu,” *The Star Newspaper*, September 12, 2011, accessed January, 24, 2012, <http://www.the-star.co.ke/news/article-49805/briton-killed-wife-kidnapped-al-shabaab-village-lamu>.

<sup>14</sup> East African Law Society statement on Kenya’s draft Anti Terrorism Bill, May 29, 2003, accessed August 17, 2012, <http://www.legalbrief.co.za/article.php/story=20030529104589999>.

violence, bar brawls, street or school violence.”<sup>15</sup> The definition leaves room for wide interpretation and can thus be used to victimize citizens or political enemies. Nthamburi supports this argument that the bill “rel[ies] on a vague, ambiguous and imprecise definition whereby it is possible to criminalize legitimate forms of exercising fundamental liberties, peaceful political and/or social opposition and lawful acts.”<sup>16</sup> Thus, the bill would as likely do too little to punish terrorists as do too much to silence legitimate political opposition—but, according to these critics, would probably not do much for Kenyan security.

Indeed, EALS concludes that if the bill is enacted into law, it runs the risk of being struck down by the high court as unconstitutional. The bill was also criticized “as an absurd imitation of the U.S. Patriot Act of 2001, the South African Terrorism Bill of 2002 and Britain's Anti-Terrorism, Crime and Security Act of 2001.”<sup>17</sup> According to Wanjiru, these accusations stem from two clauses in the bill. The bill grants powers to foreign governments over Kenyan officials. She argues that Section 34 directs the “commissioner of police to avail intelligence and logistical support” to foreign countries pursuing terrorists. The bill further directs Kenya’s attorney general to execute foreign states’ requests regarding the “tracking down, attachment, or forfeiture of any suspected terrorist property located in the country.”<sup>18</sup> Clause 37, regarding the extradition of Kenyans, raises the same question of foreign influence. The clause was criticized because there was no legal framework to safeguard the extradition and, furthermore, because it simply allowed foreign intelligence services and forces to operate in the country.<sup>19</sup>

The Committee on Administration of Justice and Legal Affairs argued that “the proposed bill threatens to tear apart the very fabric of one nation and could offer fertile

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<sup>15</sup> Ibid.

<sup>16</sup> Nevada Nthamburi, “Fighting Terror in East Africa: Less Liberty for More Security? Analysis of Anti-terrorism Legislation and Its Impact on Human Rights” (Master’s thesis, University of Cape Town, 2002).

<sup>17</sup> “Kenya’s Terror Bill Rejected,” British Broadcasting Corporation, July 15, 2003, accessed January 24, 2012, <http://news.bbc.co.uk/2/hi/africa/3069211.stm>

<sup>18</sup> Kamau, “Kenya & the War on Terrorism”, 137.

<sup>19</sup> Ibid.

ground for inter-religious animosity and suspicion.”<sup>20</sup> Kenyans have coexisted peacefully for years while embracing each other’s religion without problems. The introduction of the Suppression of Terrorism Bill 2003 particularly infuriated Muslims, who complained of being unfairly targeted by the legislation. Specifically, in Clause 12, Paragraph 2, the bill states:

a person who, in a public place wears an item of clothing, or wears or carries or displays an article in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a declared terrorist organization is guilty of an offense.<sup>21</sup>

This section essentially gives the police power to arrest Muslims wearing religious garb. Having gone through two oppressive regimes, those of former presidents Kenyatta and Moi, Kenyans feel that such legislation is a step backward. Similar sentiments were also aired regarding the Prevention of Terrorism Act 2012 before it was signed into law by the president. The act, which has fewer controversial clauses, was criticized for not being aligned with the constitution. Billow Kerrow, a former legislator argued regarding the 2012 Prevention of Terrorism Bill argued:

It seeks to limit the threshold required by security agencies to secure conviction of a suspect, in obvious contradiction of provisions in the Bill of Rights. In most sections, there are references to ‘reasonable grounds to believe’ which implies a balance of probabilities. This is likely to be abused by the State to convict suspects on flimsy grounds without adducing actual proof.<sup>22</sup>

In light of these issues of context and contention, this thesis will explore past and future antiterrorism legislation in Kenya, with a particular eye towards whether the existing law offers a sufficient legal framework for combating terrorism—that is, one that allows the state to protect itself and its citizens from terrorist attacks, but that also safeguards hard-won civil liberties. This thesis argues that the existing criminal justice

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<sup>20</sup> Ibid.

<sup>21</sup> The Suppression of Terrorism Bill, 2003, 30 April 30, 2003), Clause 12(2).

<sup>22</sup> Billow Kerrow, “Anti-Terrorism Bill Should be Aligned with the Constitution,” *Standard Digital*, September 23, 2012, accessed September 25, 2012, [http://www.standardmedia.co.ke/?articleID=2000066749&story\\_title=Columns:%20Anti-terrorism%20Bill%20should%20be%20aligned%20with%20Constitution](http://www.standardmedia.co.ke/?articleID=2000066749&story_title=Columns:%20Anti-terrorism%20Bill%20should%20be%20aligned%20with%20Constitution).

system is insufficient to deal adequately with terrorist threats in the Republic of Kenya; and whereas counterterrorist measures were recently legislated, human rights are still at risk of being violated by politicians and rogue law-enforcement agencies.

#### **D. THOUGHTS ON TERRORISM AND LEGAL RESPONSE**

Globally, the 9/11 attacks “and the subsequent war on terrorism brought to light issues that have in the past lurked in a dark corner at the edge of the legal universe, such as how a constitutional regime should respond to violent challenges.”<sup>23</sup> Some scholars argue that “respecting liberty to the full extent will jeopardize the discretionary power which the government needs to guarantee security, and that sacrificing some of our freedom rights is a small offer to bring for our security.”<sup>24</sup> This sentiment has left governments, including Kenya, in a dilemma on whether to “trade human rights for security.”<sup>25</sup>

Elena Pokalova posits that the dilemma is higher in democratic governments than in autocratic regimes. She argues that liberal democracies have a dual role of providing security and protecting the rights and liberties of the citizenry. Any antiterrorist policy implemented must be in “compliance with the democratic values held by the citizens.”<sup>26</sup>

This tension is almost as old as the theory and practice of modern democracy itself. John Locke in his *Second Treatise of Government*<sup>27</sup> discusses the “prerogative power vested in the executive branch of the government.” According to him the “prerogative power” is:

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<sup>23</sup> Ian Brownlie, “Interrogation in Depth: The Compton and Parker Reports,” *Modern Law Review*, no. 35 (1972), 501.

<sup>24</sup> Transnational Terrorism Security and The Rule of Law, “The Ethical Justness of European Counterterrorism Measures,” December 19, 2008, 7, accessed July 24, 2012, <http://www.transnationalterrorism.eu/tekst/publications/WP6%20Del%2012b.pdf>.

<sup>25</sup> Ibid.

<sup>26</sup> Elena Pokalova, “Terrorism: The Dilemma of Response,” in *International Criminal Justice: Critical Perspectives and New Challenges*, ed. G. Andreopoulos, (Springer Science+Business Media, LLC, 2011), doi: 10.1007/978-1-4419-1102-5\_5.

<sup>27</sup> John Locke, *Second Treatise of Government* (Gutenberg eBook, 2005), accessed July 24, 2012, <http://gutenberg.org/files/7370/7370-h/7370-h.htm>.

nothing but the peoples permitting their rulers to do several things of their own free choice, where the law was silent and sometimes too against the direct letter of the law for the public good and their acquiescing in it when so done... when the ruler applies her prerogative power for the public good, such action is considered the right thing to do whichever way one looks at it.<sup>28</sup>

The “prerogative power” is essential in dealing with situations where adherence to existing rules of law would lead to grave social harm. It permits extralegal measures, provided they are executed for the common good. Locke posits that any government exercising power for any purpose save for the public good is dictatorial and may validate a popular uprising to restore “the people’s rights and limit arbitrary resort to such powers.”<sup>29</sup> When Locke’s theory of prerogative power is applied to counterterrorism, the theory seems to support any measure instituted by the government for public safety and good, even if it is contrary to the express provisions of the law. This theory seems to place a lot of trust in government, that such power will be used for the public good only. Today, despite a real and palpable terrorist threat, citizens of many of the world’s democracies, including Kenya, seem disinclined to make this assumption.

In Kenya, ethnic tensions within the state may exacerbate this uneasiness with the government’s aims—perhaps with reason. Professor Gross, in his paper, “Security vs. Liberty: An Imbalanced Balancing,”<sup>30</sup> argues that counterterrorism measures are often directed toward a suspect community, whether foreigners or citizens, whom he deems “others.” The “others” are considered outsiders who bring or threaten harm to the society of “us.” He further argues that the “clearer the distinction exists between ‘us’ and ‘them,’ the greater the threats they pose to the ‘us,’ the greater in scope the powers assumed by governments and tolerated by the public.”<sup>31</sup> This steeply pitched slope might also be slippery. The potential for the devaluation or even violation of human rights is

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<sup>28</sup> Ibid., section 164.

<sup>29</sup> Ibid.

<sup>30</sup> Oren Gross, “Security vs. Liberty: An Imbalanced Balancing,” University of Minnesota Law School, Legal Studies Research Paper Series, Research Paper No. 09–42, September 10, 2009, accessed July 25, 2012, SSRN: <http://ssrn.com/abstract=1471634>.

<sup>31</sup> Ibid.



particularly acute in Africa. And yet, the approach of the Suppression of Terrorism Bill and many similar measures may run this risk unnecessarily.

J. Shola Omotola argues that African counterterrorism measures “compromise both human rights and national security, since human rights and national security are mutually reinforcing.”<sup>32</sup> The violation of human rights through counterterrorism measures pushes national security to the margin. According to Omotola, it is better from a civil-liberties standpoint to pursue terrorism by tackling the source of violence—such as asymmetrical power relations, global insecurity, and rising poverty—through increased political tensions, human-rights activism, and more radicalized struggle. In the end, a polity like Kenya could find itself more secure and more democratic in the process.

Laws are meant to foster order and create conditions for equality to thrive in. This observation underscores the reason that the people’s representatives to parliament (that is, politicians) are obligated to pass legislation that supports the people they represent. This requirement assumes there is accountability in the process of lawmaking. Politicians must strike a balance among the interests of the people they represent—and their religious, racial, social, economic, and nationality divides, *inter alia*—with criticism from civil society and other watchdog groups, as a measure of the quality of their legislation. The pages that follow examine Kenya’s record in this connection and offer recommendations to foster this careful balance while keeping Kenya secure. The paper will focus on the criminal justice system, a U.K case study, and current counterterrorism legislation in the country.

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<sup>32</sup> J. Shola Omotola, *Assessing Counter Terrorism Measures in Africa: Implications for Human Rights and National Security*, accessed July 25, 2012, [http://humansecuritygateway.com/documents/ACCORD\\_AssessingCounterTerrorism\\_Africa.pdf](http://humansecuritygateway.com/documents/ACCORD_AssessingCounterTerrorism_Africa.pdf).

## **II. ANALYSIS OF THE CRIMINAL-JUSTICE SYSTEM IN KENYA**

Terrorism over the years has evolved in both scope and sophistication, challenging the criminal-justice systems of developed and developing states alike. In Kenya, for instance, the penal code (PC) does not even mention the word “terrorism.” The PC does criminalize and punish several acts that might follow from a terrorist incident—murder, arson, etc.—but does not include a specific offense of “terrorism.” This chapter analyzes the Republic of Kenya’s criminal-justice system in line with universal principles in order to determine if it is sufficient to deal with terrorism. Has the country’s system evolved in tandem with the threat of terrorism to the extent that counterterrorism legislation is not required?

### **A. THOUGHTS ON TERRORISM AND CRIMINAL JUSTICE**

There is a diverse literature on terrorism and legislation. Some of the distinguished contributions have come from scholars such as Peter Chalk, Elena Pokolova, Paul Wilkinson, Alex Schmid, Richard Clutterbuck, and Bruce Hoffman. For his part, Peter Chalk argues that “the main purpose of criminal law within the modern liberal democratic state is to prevent unconstrained individual behavior from upsetting the order of society as a whole.”<sup>33</sup> Legal restraint, justly imposed on the government in the form of constitutional safeguards, thus forms an integral part of any liberal democratic polity.

One of the most significant discussions in the fight against terrorism is how liberal democratic states respond legally to acts of terror. The legal approach is generally acceptable because it prevents rogue individuals from disturbing the social order. Elena Pokolova argues that the counterterrorism approach allows a state to respond swiftly. She cites America’s Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) as an example of

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<sup>33</sup> Peter Chalk, The Response to Terrorism as a Threat to Liberal Democracy, *Australian Journal of Politics and History*: vol. 44, no. 3 (1998), 374

legislation that was enacted within a few weeks following a major terrorist attacks. Such legislation provides a quick alternative, as opposed to attempts at conciliation or installation of security equipment. Counterterrorism measures are also visible for all to witness; the public is aware of measures taken by the state because they are publicized widely. This approach targets terrorism exclusively. Pokalova argues that “the response here is not inhibited by specificities of other groups of crime.”<sup>34</sup> Policy makers can introduce unique measures different from those applied to other crimes.

Peter Chalk argues that there is always a danger of overreaction when liberal democracies confront terrorism using law. He states that: “government officials typically make radical and unjustified departures from conventional judicial and law enforcement procedures.”<sup>35</sup> He asserts that there is the danger of deliberately misinterpreting or disregarding the principles of due process. According to Chalk, the solution is for liberal democratic states to commit “to uphold and maintain constitutional systems of legal authority.”<sup>36</sup> He states further that “by undermining the very principles of liberal democracy, counter-terrorism loses its legitimacy.”<sup>37</sup> Chalk explains that, if counterterrorist measures are not well defined, controlled, and limited, institutionalized policies to counter terrorism might be worse than the acts themselves. It is therefore imperative for the state to ensure that strict control of anti-terrorism mechanisms adhere to a lucid structure of legal control.<sup>38</sup>

Scholars have grappled with the effectiveness of legislation in the fight against terrorism. Paul Wilkinson, for example, argues that assessing counterterrorism laws is always problematic, because specific legislation can be employed in a very wide range. Some laws are aimed at prevention, thereby addressing grievances that affect particular sections of the population. Others are aimed at deterring terrorist acts. Wilkinson cites laws in various countries, including the U.S., where severe punishments were introduced

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<sup>34</sup> Pokalova, *Terrorism: The Dilemma of Response*, 114–115.

<sup>35</sup> Chalk, *The Response to Terrorism as a Threat to Liberal Democracy*, 377.

<sup>36</sup> Ibid

<sup>37</sup> Ibid

<sup>38</sup> Ibid

for hijacking aircraft. A lot of laws aimed at counterterrorism deal with protecting human life and property, and therefore any legislation enacted empowers authorities to apprehend and convict the perpetrators of terrorist acts. He gives an example of laws passed in the U.S., namely, extradition laws, the *aut dedere aut judicare* principle, and laws requiring explosives to be tagged.

According to Alex Schmid, democratic countries are always in a dilemma when confronted by terrorism and are torn between laws that are effective or acceptable. Schmid argues that measures implemented by a democratic regime have to be accepted by society and effective against terrorists. Schmid explains: “It looks as if we have to make a cruel choice: do we want to sacrifice some democratic substance in order to be effective against terrorism or do we have to tolerate a certain level of terrorism for the sake of maintaining the civil liberties and political rights which we cherish.”<sup>39</sup>

Richard Clutterbuck asserts that terrorists endeavour to make the system of law within a liberal state unworkable. He argues that terrorists intimidate juries and witnesses so as to accuse governments of repression. In 1973, in Northern Ireland, trials without jurors were introduced to try and curb jury and witness intimidation. In the case of witnesses, Clutterbuck argues that it is justifiable for informers to be offered incentives and protection when giving evidence against terrorists. In the fight against the Red Brigade of Italy, these incentives helped prosecute terrorists in large numbers.<sup>40</sup>

Bruce Hoffman et al., also make an analysis regarding strategies and tactics implemented by governments around the world in countering terrorism. They argue that civil–governmental relations should not be underestimated in this campaign. Responding to public interests and concerns is known to have worked successfully against terrorism. The contrary is also true, because any government will find it difficult to operate within a population that is dissatisfied; intelligence collection is severely hampered, while terrorists can exploit the same population through propaganda. Hoffman and Morrison-Taw cite the example of British legislation in Malaya and Kenya that proved successful:

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<sup>39</sup> Alex P. Schmid, ed et al. “Terrorism and Democracy” in *Western Responses to Terrorism*, (Frank Cass and Company Limited, 1992), 15.

<sup>40</sup> Richard L. Clutterbuck, *Terrorism in an Unstable World*, (New York: Routledge, 1994), 213.

terrorists were offered lighter or commuted sentences for confession and abandoning their organizations. Similar strategies were also used in Italy against the Red Brigade. In most cases, the government substituted harsh punishments with emergency regulations to facilitate operations. Hoffman et al point out that such regulation never met the standards of the 1977 Geneva protocol on the protection of victims of non-external war.<sup>41</sup> Governments introducing emergency regulations had to address restrictions to civil liberties.

## **B. THE CRIMINAL-JUSTICE SYSTEM IN KENYA**

The Republic of Kenya's criminal-justice system consists of laws, the legislature, the courts, the police, and the prisons department. On one hand, Kenya's system rests on a well-developed body of laws and measures, as befits a law-based society. On the other, key failings in Kenya's law and criminal-justice practices reveal flaws in the fabric of Kenyan civil liberties—flaws that may rip entirely under the tensions of terrorism. According to Crelinsten et al, the word “system” in the phrase “criminal-justice system” implies a degree of cooperation and well-meshed coordination among the various subsystems that make up the whole.<sup>42</sup> Patricia Mbote and Migai Akech argue that the Kenyan system is flawed, especially concerning its investigatory and prosecutory methods, which are found in the criminal-procedure act. They point out that the system is characterized by “wide but unregulated discretionary powers.”<sup>43</sup> According to them, law enforcers have at their disposal the authority to arrest or not to arrest; to detain or not to detain; to investigate or not to investigate; to charge or not to charge; and to prosecute or not.<sup>44</sup> A cross-section of the criminal-justice system involves policing and the legal framework, both of which demonstrate certain troubling aspects.

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<sup>41</sup> Bruce Hoffman and Jennifer Morrison-taw, A Strategic Framework for Countering Terrorism, in Fernando Reinares ed. *European Democracies Against Terrorism: Governmental Policies and Intergovernmental Cooperation*, (Burlington, VT; Ashgate Publishing Company Limited, 2000), 12–14.

<sup>42</sup> Crelinsten, Ronald D., Danielle Laberge-Altmejd, and Denis Szabo. *Terrorism and Criminal Justice: An International Perspective*, (Lexington, Mass.: Lexington Books, 1978)21.

<sup>43</sup> Patricia K. Mbote and Migai Akech, *Kenya: Justice Sector and The Rule of Law*, March 2011, 119.

<sup>44</sup> Ibid.

## **1. Policing**

Police functions in the country are performed by the Kenyan police (KP), administration police (AP), the National Security Intelligence Service (NSIS), and the Kenyan defense forces (KDF). The Kenyan police are the lead agency in policing duties within the borders, as stipulated in the Police Act.<sup>45</sup> The force is the focal point in the criminal justice system and plays a pivotal role in fighting terrorism. Their functions include “maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged.”<sup>46</sup>

The AP is established through a separate act, the Administration Police Act (APA).<sup>47</sup> The AP falls under the provincial administration chain of command, answerable to the president. Its role is strictly to assist the provincial and district commissioners, district officers, and chiefs in conducting their day-to-day chores. The AP’s duties include preventing the commission of offenses and maintaining the public peace. The AP can arrest perpetrators of crime and are allowed to use firearms.

The National Security Intelligence Service is headed by a director general appointed directly by the president. The NSIS was established in 1998 through the National Security intelligence Service Act.<sup>48</sup> This organization gathers information on threats to national security and intelligence.

The power to arrest and prosecute rests with the Kenyan police and the director of public prosecutions (DPP), who are tied to the provisions of civil and criminal law. The police have on several occasions been accused of abusing powers bestowed to them by law, for instance, arresting and detaining suspects without following the stipulated regulation. Under the constitution, any arrested person must be informed of the offence and the reason for his arrest and should be arraigned in court “as soon as is reasonably

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<sup>45</sup> Police Act, Chapter 84, Laws of Kenya.

<sup>46</sup> Ibid 14(1).

<sup>47</sup> Administration Police Act, Chapter 85, Laws of Kenya.

<sup>48</sup> National Security Intelligence Act, No. 11 of 1998, Laws of Kenya.

practicable.”<sup>49</sup> On several occasions, the police have arrested and detained individuals for up to twenty-four hours without giving reason. In the event that an arrest is made on a Friday, they claim that courts and advocates cannot be accessed until Monday.

The other area where police have been accused is extrajudicial killings. A report by the UN special rapporteur on extrajudicial killings points out that in Kenya, the “killings by the police are widespread. Some killings are opportunistic, reckless or personal. Many others are carefully planned. It is impossible to estimate reliably how many killings occur, because the police do not keep a centralized database.”<sup>50</sup> The force is also perceived by a majority of Kenyans as corrupt; this has been confirmed by Transparency International, who several times have ranked them number one in corruption among government institutions.<sup>51</sup> According to Migai and Mbote, the police have long been used by politicians to oppress the opposition. The organization has been a political tool of those at the helm.<sup>52</sup>

## **2. Prosecution**

Before the enactment of the new constitution in 2010, the attorney general (AG) was the sole decision maker regarding the prosecution of criminal offences. He could order the police to conduct investigations on any case.<sup>53</sup> The government top brass used and misused this aspect bestowed on the AG for political reasons. The AG selectively chose whom to prosecute and whom to let go, depending on political affiliation or backing. Though the new constitution seeks to improve the independence and accountability of the criminal-justice system, the results are yet to be seen. The DPP is

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<sup>49</sup> The Constitution of Kenya, 1963, Section 72.

<sup>50</sup> United Nations Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Kenya, (May 26, 2009), 6.

<sup>51</sup> Transparency International, *Kenya Bribery Index* (2008), 16–17.

<sup>52</sup> Mbote and Migai, *Kenya: Justice Sector and The Rule of Law*, 130.

<sup>53</sup> The Constitution of Kenya 1963, Section 72. Section 26(3) states that: The Attorney General shall have power in any case in which he considers it desirable so to do -(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person; (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

now in charge of all state prosecutions. He has no power, however, to discontinue a case without the authority of the court and neither can he take over a case without permission from whoever instituted it.<sup>54</sup> In Kenya, the majority of prosecutions are carried out by police officers<sup>55</sup> who lack sufficient legal knowledge to enable them go head to head with established advocates representing defendants. Advocates quite often poke holes on the evidence adduced in courts and seek legal gaps that the prosecutors are unable to fathom. The other issue is that most high-profile cases involving the rich have been thrown out, while the poor are punished. This has been attributed to high-level corruption among judicial personnel and police prosecutors.<sup>56</sup> Due to rampant incompetence and malpractice, human-rights bodies are leery of how issues of extradition and mutual legal assistance are handled in Kenya.

According to the UN Security Council resolution 1373 of 2001, “the council decided that states should afford one another the greatest measure of assistance for criminal investigations or criminal proceedings relating to the financing or support of terrorists acts.”<sup>57</sup> States were also compelled to “exchange information and cooperate to prevent and suppress terrorist acts and to take action against the perpetrators of such acts,”<sup>58</sup> regardless of their stand on the universal instruments. In essence, states are obligated by the mutual legal-assistance requirements to offer any evidence or information to another country, whether requested or not, to combat terrorism.

The Republic of Kenya has enacted Mutual Legal Assistance Act 2011, which specifically deals with bilateral assistance with other states in terms of investigations,

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<sup>54</sup> The Constitution of Kenya 2010, Chapter 9, Section 157 (6), The Director of Public Prosecutions shall exercise State powers of prosecution and may (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed; (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority.

<sup>55</sup> Kenya Police, Force Standing Orders, chapter 48, Section 7 (i). Provide that all police officers of or above the rank of inspector are public prosecutors.

<sup>56</sup> Gitobu Imanyara, Systems and Structures Set up by the Government to Fight Corruption: How Effective and What More Can Be Done? in Strengthening Judicial Reforms in Kenya, vol. IX: The *Anti corruption Court in Kenya* (icj-kenya 2004), 49,

<sup>57</sup> United Nations Security Council Resolution 1373(2001) press release sc/7158

<sup>58</sup> Ibid



prosecutions, and judicial matters. Part 1, Clause 3, states that it shall “(a) apply to requests for legal assistance from any requesting state or international entity to which Kenya is obligated on the basis of a legal assistance agreement or not; (b) regulate the rendering of legal assistance to any requesting state, unless otherwise regulated by agreement.”<sup>59</sup> The act elicited controversy because it does not allow the concerned party to challenge the order in court. Neither does it reveal which countries are in agreement with Kenya and under what mutual agreement search information is to be shared

### **3. The Legal Framework**

The penal code<sup>60</sup> makes provisions for substantive law, while the criminal-procedure code (CPC) is merely procedural law, as the name suggests. A host of other laws (and subsidiary legislation) criminalize certain acts or omissions. The consequences of terrorism will affect both people and property, or even vessels. Thus, there are provisions in the PC that criminalize and punish acts that injure people, property, and vessels—but that is by chance rather than design. Furthermore, the PC does not mention “terrorism” as an offence at all, in the way it does murder or manslaughter. Still, there are many provisions in Kenyan civil and criminal law that, if wholly exploited, could suffice in the fight against terrorism. These acts include:

- The penal code <sup>61</sup>
- Anti-Corruption and Economic Crimes Act
- The Banking Act<sup>62</sup>
- The Banking Amendments Act 2001
- The Protection of Aircraft Act
- The Official Secrets Act<sup>63</sup>

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<sup>59</sup> The Mutual Legal Assistance Act 2011 No. 36 (2011).

<sup>60</sup> The penal code is divided into sections. For instance, offences against the person are prescribed in division IV, while offences relating to property are prescribed in division V.

<sup>61</sup> Cap 63 Laws of Kenya

<sup>62</sup> Ibid

<sup>63</sup> Cap 487 Laws of Kenya

- The Fugitive Offenders Pursuit Act<sup>64</sup>
- The Extradition (Commonwealth) Act<sup>65</sup>
- The Extradition (Contiguous and Foreign Countries) Act<sup>66</sup>
- The Anti-Money Laundering and Proceeds of Crime Acts

The crime of terrorism as a whole encompasses crimes that are prosecutable under Kenyan law, and which, if applied, could curb the crime of terrorism to a large extent. These crimes include,

- Financing of terrorist activities<sup>67</sup>
- Possession of explosive substances<sup>68</sup>
- Conspiracy to kill<sup>69</sup>
- Murder<sup>70</sup>
- Conspiracy to murder<sup>71</sup>
- Unlawful seizing or exercising of control of aircraft<sup>72</sup>
- Willful destruction of property by explosives<sup>73</sup>
- Grievous harm<sup>74</sup>
- Arson<sup>75</sup>
- Sabotage<sup>76</sup>

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<sup>64</sup> The Laws of Kenya Cap 87.

<sup>65</sup> Ibid., Cap 77.

<sup>66</sup> Ibid., Cap 76.

<sup>67</sup> Banking Act and the Banking Amendments Act 2001.

<sup>68</sup> The Penal Code of Kenya, Section 235.

<sup>69</sup> Ibid., Section 220.

<sup>70</sup> Ibid., Section 203.

<sup>71</sup> Ibid., Section 224.

<sup>72</sup> The Protection of Aircraft Act, Section 3.

<sup>73</sup> The Penal Code of Kenya, Section 340.

<sup>74</sup> Ibid., Section 234.

<sup>75</sup> Ibid., Section 332.

<sup>76</sup> Ibid., Section 343.

The 1998 U.S embassy bombing in Nairobi resulted in the deaths of over 214 persons<sup>77</sup> and left over 5000 injured.<sup>78</sup> This is murder, according to the penal code, and the suspects were liable for murder. Similarly, the suspects who were arrested for the Kikambala bombing in Mombasa were charged with murder. According to the PC, the penalty for such a crime is death.<sup>79</sup>

Under the Explosives Act, punishments are graded depending upon the magnitude of the resulting harm. The penalty for the crime of endangering the safety or causing loss of life varies from:

- A maximum fine of 5,000 Kenyan shillings (KES), equivalent to \$62, and/or a maximum term of twelve months in prison
- For a negligent explosion where life is endangered, a maximum fine of 10,000 KES (\$125) and/or a maximum term in prison of twelve months
- For a willful act or omission causing danger to life or property if not resulting in death, twelve years in prison with no option of a fine
- For a negligent explosion resulting in death, a maximum fine of 20,000 KES (\$250) and/or a prison term of two years.<sup>80</sup>

Under the Explosives Act, the materials used in the 1998 and Kikambala bombings were classified as explosives. The act states that “no person shall keep, store, or be in possession of an unauthorized explosive,”<sup>81</sup> subject to certain exceptions that in

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<sup>77</sup> Kenya Times, *The African bombings*, (17 August 1998), 25.

<sup>78</sup> The Daily Nation Newspaper, Nairobi Kenya, (August 28 1998), 2.

<sup>79</sup> The Laws of Kenya, Cap 63 Section 204, state that “any person convicted of murder shall be sentenced to death.”

<sup>80</sup> Kenya Explosives Act

<sup>81</sup> Ibid., Section 6 Cap 115 allows for the exception of explosives manufactured for the sole purpose of chemical experiment (Section 4(1)(a) not exceeding two kilograms or manufactured solely as a practical trial, not for sale and in quantities specified by an inspector (Section 4(1)(b) and kept, stored or possessed in a manner specified by an inspector. Section 7(1) cap 115 restricts storage or possession of authorized explosives except

In an explosives factory or magazine;

If kept for private use, not for sale or disposal and in accord with the rules;

If kept for construction of rail, road or other public work, not more than 500 kilograms and kept in a manner specified by an inspector or in writing;

In quantities of less than 500kilograms stored in an approved isolated place as specified in (c) above; or

If kept by a person licensed to deal in explosives.

no way whatsoever cover or explain the possession of the explosives that resulted in the U.S. embassy bombings. The Explosives Act specifically provides that the importation of explosives without a permit issued by an inspector is prohibited. The penalty provided is 3,000 KES (\$37) or imprisonment for one year, which is seen as too lenient considering the intended damage or deaths that might arise from the crime. The persons who conveyed or caused the explosives to be conveyed within Kenya without a permit are also in breach of the act and could be fined 2,000 KES (\$25) or six months in prison. The act restricts storage or possession of unauthorized explosives in any premises. Punishment for breach attracts a fine of 3,000 KES (\$37) or imprisonment for one year. Owners or occupiers of premises in which explosives are stored are also liable, unless they satisfy the court that they were not aware of the items stored.

The deficiencies of the criminal-justice system in Kenya have led to fresh initiatives and a rise in procurement of private security services. Citizens have resorted to handling the law themselves (through mob justice), while the rich have taken up private security to guard their interests. According to Migai and Mbote, this results from the miscarriage of justice, where police are bribed to interfere with evidence and judges are compromised.<sup>82</sup>

### **C. OTHER DEFICIENCIES**

The system is also deficient in the following ways:

#### **1. Provisions**

Kenyan criminal law does not specifically provide for terrorism, but for crimes encompassed by terrorism. Therefore, only some aspects of terrorism are covered in the criminal law, which is not sufficient to curb terrorism or give it the emphasis and due attention the associated crimes require. This erodes the seriousness of antiterrorism law. Some aspects of terrorism, such as funding, are not provided for in criminal law, leaving gaping holes for criminals to exploit.

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<sup>82</sup> Mbote and Migai, *Kenya: Justice Sector and The Rule of Law*, 140.

## **2. No Anticipatory Crimes**

Kenya's criminal laws do not provide for anticipatory crimes. This means that, to a large extent, the effective collection of intelligence would not enhance the criminal justice system, because the information collected could not be used to prosecute persons intending to commit terrorism. If the criminal laws would provide for prosecution of anticipated crimes, the justice system would be a milestone ahead in the fight against terrorism. If suspects were prosecuted once sufficient information on the planned commission of a crime were foreseen, many of the explosions and bombings in the country might be made less severe, if not prevented entirely.

## **3. No Reward System**

Rewarding volunteers who give information prompts fast responses that can lead to the prevention of terrorist acts or prosecution of suspects. Cooperation is easily given when people are motivated, and a reward system would do that. Unfortunately, there is no express provision in Kenyan law to reward people who volunteer reliable information on terrorism. Even terrorist suspects can be prompted for information on other individuals involved in terrorism. Once these suspects volunteer such information, a lesser sentence can be preferred for them, or amnesty. Given the different ways of commission, terrorism may be effectively preempted, prevented, and prosecuted under proper information given before a terrorist crime or after its commission.

## **4. No Anticipatory Criminal Investigation**

Kenyan criminal law does not provide for anticipative criminal investigation. For any investigation to commence, a crime must have been committed or there must be sufficient ground to believe a crime is about to be committed. Evidence obtained in the latter case can fall under conspiracy to commit a felony, based on the credibility of the evidence obtained or of a suspect's being in possession of such items as would be found illegal. This leaves preparation for the crime of terrorism aloof, which can be exploited by terrorists, since the law does not provide for prosecution of terrorism or any other crime in anticipation. The crime has to have been committed first. Otherwise a lesser charge would be preferred if the crime was not committed.

## **D. CRIMINAL JUSTICE AND TERRORISM**

Most criminal justice systems (Kenya's included) are quite ineffective in the sense that they respond to a crime after the fact. This "lag" is particularly problematic in the case of terrorist acts, which may have devastating effects if they are allowed to reach fruition. According to the United Nations Office on Drugs and Crime (UNODC) handbook:

A forward-looking, preventive criminal justice strategy against terrorist violence requires a comprehensive system of substantive offenses, investigative powers and techniques, evidentiary rules and international co-operation. The goal is to proactively integrate substantive and procedural mechanisms to reduce the incidence and severity of terrorist violence and to do so within the strict constraints and protections of the criminal justice system and the rule of law.<sup>83</sup>

This balance may not be so easy to strike or sustain in Kenya, because various government agencies are not configured to deal with the threat of terrorism. They lack the capacity to deliver and perform dismally in one way or another when confronted with the task.

### **1. Law Enforcement**

Law enforcement agencies face a daunting task when confronted with terrorism, because their response must be within the international human rights framework and the rule of law. In Kenya, these agencies have some peculiar issues that render them less than optimally effective for countering terrorism.

#### ***a. Investigation***

Terrorism demands specialized investigation techniques that must comport with the internal and international legal framework. According to the UNODC, police investigation methods that compromise individual rights are only justified on the basis of necessity and proportionality. In Kenya, investigation and prosecution procedures are tabulated in the Criminal Procedures Act. Investigations have long been criticized by the

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<sup>83</sup> United Nations Office on Drugs and Crime, *Handbook on Criminal Justice Responses to Terrorism*, (Criminal Justice Handbook Series, United Nations New York, 2009), 3.

legal fraternity as flawed. Several cases have been dismissed or quashed on grounds of poor investigations, where the court has argued that the evidence adduced does not meet the minimum threshold or standards in criminal cases.<sup>84</sup> These substandard investigations can be attributed to constant transfers among police officers and a lack of forensic capability. Police officers often end up transferred without completing investigations to the required standard, and in cases where they have completed investigations, they are either unavailable or the evidence is still lacking. The minimum threshold of criminal law is beyond reasonable doubt, and this can only be achieved (sometimes) through forensic investigation and dedication to duty. The police lack this capacity, which cannot be tolerated in the fight against terrorism.

***b. Information Gathering***

Intelligence gathering is essential in the fight against terrorism and can be conducted through covert or overt sources. Due to the nature of terrorism, intelligence and law enforcement agencies need to cooperate with their counterparts in other states. Covert intelligence collection has been critiqued, especially when not supported by law. Covert actions generally infringe on Article 17 of the ICCPR. The law must therefore prescribe conditions and regulations regarding covert collection, all of which must be stipulated in detail and implemented without bias. Covert collection methods that are currently used against terrorist suspects are wiretapping, Internet monitoring, and installation of tracking devices. Apart from laws governing unlawful interference, the information gathered must also be protected against arbitrary disclosure.

The 2011 Mutual Legal Assistance Act stipulates that “Kenya may in accordance with the provisions of this Act and any other relevant law, execute a request from a requesting state for (a) the interception and immediate transmission of telecommunications; or (b) the interception, recording and subsequent transmission of telecommunications.”<sup>85</sup> This provision has been criticized for lack of safeguards similar

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<sup>84</sup> The required standard must be beyond reasonable doubt.

<sup>85</sup> The Mutual Legal Assistance Act 2011 No. 36 ( 2011), Part v, clause 27(1).

to those found in more established democracies such as the U.K., where the court must approve any interception.

*c. Arrest and Detention*

Terrorism can be prevented by confining terrorists. In most cases, this entails arrests, detention, and imprisonment. According to the “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,” the following terms are defined as indicated:

Arrest means the act of apprehending a person for the alleged commission of an offense or by the action of an authority. Detained person means any person deprived of personal liberty except as a result of conviction for an offence. Imprisoned person means any person deprived of personal liberty as a result of conviction for an offence.<sup>86</sup>

The arrest and detention of an individual must be subject to prescribed conditions under law. These conditions are also subject to accountability and oversight. According to the ICCPR, any person arrested or detained must appear before a magistrate, judge, or any competent legal authority.<sup>87</sup> He has the right to appear before a court for the legality of the arrest and detention to be determined. UNDOC argues that there is no “universally authoritative answer to the question of how many hours or days the rule of law permits a person to be detained before being charged or released.”<sup>88</sup> In the words of the committee appointed by the United Nations High Commissioner for Human Rights (OHCHR), “Pre-trial detention should be an exception and as short as possible.”<sup>89</sup> Essentially, states have been left to determine a period that is as short as possible and acceptable to their rule of law.

In 2006–2007, the government of Kenya was accused by human-rights organizations of arresting and detaining terrorism suspects without charge. These detainees were arrested between the Kenyan and Somali borders on diverse dates and

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<sup>86</sup> General Assembly resolution 43/173, Annex.

<sup>87</sup> *International Covenant on Civil and Political Rights*, Article 9 paragraph 3.

<sup>88</sup> United Nations Office on Drugs and Crime, 56.

<sup>89</sup> OHCHR Comment No. 8 (1982).



none of them was brought before a court of law. It is estimated by the Muslim Human Rights Forum that approximately 150 individuals were arrested and only a few accessed legal representations, after the forum intervened.<sup>90</sup>

***d. Interrogation of Terror Suspects***

Once a terror suspect is arrested or detained, law-enforcement agencies embark on the collection of more information through interrogation. Any information gathered during interrogation can be used as evidence against the suspect; this is generally accepted because interrogations are guided by the principle of presumption of innocence. In this principle, the right to remain silent is also understood to be inherent. According to the ICCPR, no suspect can be compelled against his will to give information.<sup>91</sup> In the cases mentioned above in Kenya, the detainees reported ill treatment, beatings, denial of medical treatment and appalling cell conditions. The suspects later claimed being threatened and labeled as Al Qaeda members, even in simple conversation.

**2. Legal Representation and Assistance**

The ICCPR explicitly states that a suspect may by his own volition decide to be represented by a lawyer of his choice, but if he is unable to do so, the state must provide one.<sup>92</sup> Legal representation is acknowledged by the Universal Declaration of Human Rights as part of the right to a fair trial. A suspect on criminal charges must therefore be accorded this fundamental right.

In Kenya, before the establishment of the national legal-aid scheme, pro bono work was only offered by NGOs in limited specialized areas, such as divorce. Criminal cases rarely got pro bono representation, thus denying the accused the right to a fair trial. A majority of defendants are poor and cannot afford high legal fees.

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<sup>90</sup> Kenya and Counter-terrorism: A Time for Change, Redress, Seeking Reparation for Torture Survivors. (A Report by Redress and Reprieve 2009) accessed August 15, 2012, <http://www.redress.org/downloads/publications/Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf>

<sup>91</sup> *International Covenant on Civil and Political Rights*, Article 14 Paragraphs 3(g).

<sup>92</sup> ICCPR, Article 14 paragraph 3(d).

## **E. CONCLUSION**

This chapter has demonstrated that Kenya's criminal justice system is well developed under a law-based society. However, when confronted with terrorism, the system has had a tendency to violate basic civil liberties. In the absence of specific counterterrorism legislation, the country has utilized its criminal-justice system somewhat ineffectively. Agencies mandated by law to deal with crime are ill equipped to counter day-to-day crime, let alone terrorism. This chapter has also shown that the existing legal framework has provisions that can be used to deal with the crime of terrorism. However, this is not by design, but by chance. Furthermore, the punishments prescribed under these provisions are not commensurate with crime of terrorism that are more devastating than ordinary crimes, with larger numbers of casualties.

The crime of terrorism is ever evolving, and requires an equally evolving tactic to effectively deal with it. Our criminal-procedure code is insufficient to address the crime of terrorism.

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### III. THE UNITED KINGDOM'S LEGAL RESPONSE TO TERRORISM

The United Kingdom has been at the forefront of fighting the global war on terrorism, using both the criminal justice model and the war model.<sup>93</sup> The U.K.'s commendable successes in quelling or, in the Irish case, at least containing terrorism for more than a century, have been tempered by civil-liberties concerns at every stage.

At the heart of the issue is the ad hoc or exceptional basis on which U.K. counterterrorism measures typically have unfolded. According to Morag, the U.K. has “employed a mix of regular legislation, emergency legislation, and military-based emergency executive orders.”<sup>94</sup> Over time, the U.K.'s legal framework for countering terrorism has become more permanent, with several measures becoming “normal,” lasting laws. Still, emergency laws continue to exist. To date, the authority to promulgate emergency powers in the U.K still rests with the queen and is enshrined in the law of the land. In her absence, and more commonly due to time constraints, the finance minister, prime minister, and secretary of state can issue emergency regulations. However, emergency regulations nowadays are held in abeyance, in no small part because of the strong preference among lawmakers and the public alike for legislation “vetted” through the normal lawmaking process, with full account taken of civil-liberties concerns <sup>95</sup>

It is in regard to this legislative evolution that the U.K.'s approach to counterterrorism has particular relevance for Kenya. First, the U.K.'s historical enshrinement of civil liberties can be traced to the 1215 Magna Carta. Second, the U.K has been involved in creating the European Union's human rights conventions, which have shaped Europe's counterterrorism legal strategies, as well as the U.K.'s. The Republic of Kenya was a British colony, and British law forms the basis of Kenya's legal system. Indeed, Section 3 of the Kenyan penal code (before it was repealed by Number 5

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<sup>93</sup> Peter Chalk, The Response to Terrorism as a Threat to Liberal Democracy, *Australian Journal of Politics and History*: Volume 44, Number 3, (1998), 376.

<sup>94</sup> Nadav Morag, *Comparative Homeland Security: Global Lessons*, (John Wiley & Sons, Inc., Publication, 2011), 82.

<sup>95</sup> Ibid., 85.

of 2003, Section 2) provides that it shall be interpreted in accordance with the principles of legal interpretation obtained in England and that expressions shall be used with the meaning attached to them in English criminal law.<sup>96</sup> Even though new and autochthonous laws have since been enacted, the traditions and precedence of English criminal law persist, as do certain conventions of thought and expectations about civil liberties in practice.

#### **A. LEGISLATIVE MEASURES AND THE IRISH PROBLEM**

Until very recently, British counterterrorism legislation and executive policy were focused on the Irish conflict.<sup>97</sup> Although the conflict dates back to 1761, terrorist attacks intensified with the rise of the Irish Republican Army (IRA) in 1913, whose objective was an independent Irish republic.<sup>98</sup> The resistance ended in 1998 with the Good Friday Agreement, which established peace among Irish factions and between Northern Ireland and Britain.<sup>99</sup> The U.K. enacted counterterrorism legislation specifically targeting the IRA problem.

In the broadest sense, terrorism legislation in the U.K. dates back to 1922, when a statute concerning Northern Ireland was adopted. The Civil Authorities Act of 1922 established some form of control over the unionists in Northern Ireland. The act established special offences with higher penalties and distinctive trials without the presence of a jury. By 1943, Parliament was empowered with diverse powers to “[i]mpose curfews; proscribe organisations; censor printed, audio, and visual materials; ban meetings, processions and gatherings; restrict the movement of individuals to within

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<sup>96</sup> The Kenya Penal code, Cap 63, Section 3.

<sup>97</sup> Morag, *Comparative Homeland Security: Global Lessons*, 82.

<sup>98</sup> The resistance lasted for over thirty years with sporadic terrorist attacks in Ireland and Britain.

<sup>99</sup> Brendan O’Brien, *The Long War: The IRA and Sinn Féin*, (Syracuse University Press, 2nd ed., 1999), 9–12.

specified areas, and detain and interview suspects without bringing charges. The statute authorized extensive powers of entry, search and seizure [and] altered the court system.”<sup>100</sup>

Donohue adds that the most influential measure was the empowering of Northern Irish civil authority to take all measures deemed necessary to maintain peace and order. By 1943, a second act was introduced with minor changes to the 1922 act and remained in force until the early 1970s. These acts became the center of attention in the civil-rights protests of the 1960s and 1970s.

Other important legislative measures that were introduced in Ireland include:

***a. 1939 Emergency Powers (Defense) Act***

This act was introduced before World War II. The intent of the legislation was to permit the government to pursue the war more efficiently. However, the act authorized the infamous arrest and detention charge known as internment, which was also reintroduced later in Northern Ireland after the war. Internment was one of the most criticized counterterrorism measures ever introduced in Northern Ireland. The act was intended to last two years, but was prolonged until it expired in 1953, before being repealed by the government in 1973. During WWII, the IRA held several sabotage missions in a bid to undermine a U.K victory. These actions caused the enactment of the Prevention of Violence (Temporary Provisions) Act of 1939, which targeted suspects who had the intent of influencing public opinion.

***b. 1973 Northern Ireland (Emergency Provisions) Act (EPA)***

In 1973, the Northern Ireland (Emergency Provisions) Act (EPA) was introduced to replace the Special Powers Act of 1922. Like its predecessor, the 1973 act was introduced as a temporary measure, but was reviewed and amended—and prolonged—in 1975, 1977, 1987, and 1996. Donohue argues that this act became a

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<sup>100</sup> Donohue, K. Laura. “Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom.” *BCSIA Discussion Paper* 2000–05, *ESDP Discussion Paper* ESDP-2000–01, (John F. Kennedy School of Government, Harvard University, August 2000), 8.

“critical part of the ongoing fight against terrorism.”<sup>101</sup> The act reintroduced the 1922–1943 and 1939 powers. In addition, some provisions were solely enacted for Northern Ireland, such as the Diplock courts that allowed executive detention; courts without juries; restrictions on granting bail; compelling spouses to appear as witnesses against their partners; restrictions on the right of silence; stop-and-search powers for the military and police, and scheduled offences.<sup>102</sup>

*c. The 1974 Prevention of Terrorism Act*

While Ireland was subject to the EPA, the rest of the U.K. was subject to the 1974 Prevention of Terrorism Act. This not only introduced exclusion orders into Ireland, but also extended the laws to the entire U.K. The 1974 act was also adopted in Northern Ireland as emergency legislation and was re-enacted in 1976, 1984, and 1989. The act introduced exclusion orders on the basis of a previous law, the 1939 Prevention of Violence (Temporary Provisions) Act and the 1922 Civil Authorities (Special Powers) Act.

According to Vercher,<sup>103</sup> Section 3(3) of the act is intended to prevent terrorist acts that aim at influencing government policy and public opinion:

If the Secretary of State is satisfied that—(a) any person (whether in Great Britain or elsewhere) is concerned in the commission, preparation or instigation of acts of terrorism, or (b) any person is attempting or may attempt to enter Great Britain with a view to being concerned in the commission, preparation or instigation of acts of terrorism, the Secretary of State may make an order against that person prohibiting him from being in, or entering, Great Britain.<sup>104</sup>

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<sup>101</sup> Donohue, “Civil Liberties, Terrorism, and Liberal Democracy” , 9.

<sup>102</sup> Anna Oehmichen, *Terrorism and anti-terror legislation - the terrorized legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France*, (2009) ,124–125, accessed August 24,2012, [http://sfx.leidenuniv.nl:9003/sfx\\_local?year=2009](http://sfx.leidenuniv.nl:9003/sfx_local?year=2009)

<sup>103</sup> Vercher, *An International Comparative Legal Analysis*, 37.

<sup>104</sup> *Prevention of Terrorism (Temporary Provision) Act 1974*, Section 3(3).

It has also been argued that the power of exclusion is an executive rather than a judicial function, and that its aim is to prevent and not to punish. However, according to Twining, internment and exclusion “have been largely preventive in conception but punitive in execution.”<sup>105</sup> Vercher echoes Twining’s sentiments and questions the continuing existence of exclusion orders, even though no positive results were noted in Northern Ireland.<sup>106</sup> The exclusion orders were condemned, but still retained in the 1989 Prevention of Terrorism Act.

In the late 1990s, the U.K shifted focus from emergency laws to permanent laws directed at domestic and international terrorism. The Labor Party had just been reelected after a long absence and had been at the forefront in opposing emergency legislation, heavily campaigning for permanent laws. Domestic terrorism seemed to have eased off following the Good Friday Agreement with the IRA. This coincided with several international terrorist incidents in Egypt (1997), a South African hotel bombing (1998), and the embassy bombings in Kenya and Tanzania (1998). As a result, the U.K transitioned to permanent, internationally oriented legislation.

*d. 1998 Criminal justice (Terrorism and Conspiracy) Act*

This act was adopted at an exceptional parliament sitting without the normal legislative scrutiny of the house.<sup>107</sup> According to Walker, the legislation had two distinct purposes intended to deal with political violence, and as such it augmented the substantive Northern Ireland Emergency Provision Act 1996 and the Preventive of Terrorism Act 1989 (Temporary Provisions). The act targeted individuals or paramilitary

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<sup>105</sup> W L Twining, *Emergency Powers and Criminal Process: The Diplock Report*, Criminal Law Review (1973), 415.

<sup>106</sup> Vercher, *Terrorism in Europe*, 52.

<sup>107</sup> The 1998 *Criminal Justice (Terrorism and Conspiracy) Act* was hurriedly enacted after the Omagh, Kenya, and Tanzania Embassy bombings in August 1998. See Campbell B C L, *Two Steps Backwards*, The Criminal Justice (Terrorism and Conspiracy) Act 1998, *Criminal Law Review*, (1999), 941.



groups, listed under proscribed organizations that intended to scuttle the Northern Ireland peace process. It also targeted individuals suspected of scheming to commit crime outside the U.K.<sup>108</sup>

In analyzing the 1998 act, Campbell uses five criteria, three of which were borrowed from a speech by former Prime Minister Tony Blair, where he referred to them as “common-sense criteria.”<sup>109</sup> According to Campbell, the first criterion is that action taken in responding must be clearly defined. Second, it must be well thought out. Third, the legislation should improve the efficiency of terrorism measures already in place. Fourth, there must be a need for the measures adopted. Fifth, the measures must be compatible with both national and international human-rights norms, thus representing some sort of legal obligation. He argues that unless the criterion is adhered to, mistakes are bound to be replicated and a miscarriage of justice is inevitable.<sup>110</sup>

*e. Human Rights Act of 1998*

James Beckman argues that the Human Rights Act of 1998 became one of the guiding laws in the U.K.’s counterterrorism regime. This legislation was enacted in 1998 and went into effect in 2000.<sup>111</sup> All E.U. conventions of human rights were incorporated into English law, thereby becoming a constitutional norm. This piece of legislation covers pertinent issues regarding the war on terrorism, such as the right of liberty and security, and prohibits torture and freedom of association.

*f. Terrorism Act (TA) 2000*

The Terrorism Act (TA) 2000 was the work of a government-appointed group comprising the Right Honorable Lord Lloyd of Berwick, Justice Kerr (in respect to Northern Ireland) and Professor Paul Wilkinson (conducted a survey of terrorist threats).

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<sup>108</sup> Clive Walker, The Bombs in Omagh and Their Aftermath: The Criminal Justice (Terrorism and Conspiracy) Act 1998, *Modern Law Review* no. 62, (1999), 879.

<sup>109</sup> Speech by Prime Minister Tony Blair at Omagh, August 25, 1998, in Campbell, Two Steps Backwards, The Criminal Justice (Terrorism and Conspiracy) Act 1998, *Criminal Law Review*, (1999).

<sup>110</sup> Campbell B C L, Two Steps Backwards, The Criminal Justice (Terrorism and Conspiracy) Act 1998, *Criminal Law review*, (1999), 942.

<sup>111</sup> Ibid

The resultant paper, “Legislation against Terrorism,” was released on 17 December 1998 and proposed a new permanent legislation to replace the Temporary Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provisions) Acts. TA 2000 was introduced on 2 December 1999 and contained most of the provisions found in the Human Rights Act 1998. The act’s major departures from previous legislation include:

- The expansion of the definition of terrorism to encompass ideological and religiously motivated acts. It covers serious acts of violence against any person or property.
- Application of the act to all forms of terror, including domestic, unlike previous acts that only covered Northern Ireland and internal terrorism
- New powers for the secretary of state to proscribe organizations involved in domestic and international terrorism
- Introduction of the power to permit seizure of cash and its forfeiture at border posts
- Repeal of the secretary of state’s power to make exclusion orders
- Permanence for new legislation, apart from a few Northern Ireland temporary measures
- The requirement that the power of extended detention receive judicial authorisation<sup>112</sup>

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<sup>112</sup> Mary Baber, *The Terrorism Bill*, 10 of 1999–2000, Research paper 99/101,( 13 December 1999, House of Commons Library),14.

The definition in TA 2000<sup>113</sup> elicited much controversy in the House of Commons. Talbot observed that the definition was so broad as to apply in cases where the use of specialized powers was not justified and the offences not clearly terrorist in nature. Walker compares the TA 2000 definition with the 1998 version found in the Prevention of Terrorism (Temporary provisions) Act, Section 20.<sup>114</sup> Citing a review by Lloyd in 1996, Walker finds Section 20 too narrow, in that it does not tackle any issue of religious terrorism. Further, “the changes in terms of the definition are not tremendously significant; rather it is the circumstances of application which are worrying.”<sup>115</sup> TA 2000s definition is narrower than the 1998 version in two aspects. The definition drops the alternative objective in Section 20, where it states “putting the public or any section

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<sup>113</sup> Terrorism Act 2000, states that, “terrorism” means the use or threat of action where—

- (a) the action falls within subsection (2),
  - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
  - (c) the use or threat is made for the purpose of advancing a political, religious, or ideological cause.
- (2) Action falls within this subsection if it—
- (a) involves serious violence against a person,
  - (b) involves serious damage to property,
  - (c) endangers a person’s life, other than that of the person committing the action,
  - (d) creates a serious risk to the health or safety of the public or a section of the public, or
  - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1) (b) is satisfied.
- (4) In this section—
- (a) “action” includes action outside the United Kingdom,
  - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
  - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
  - (d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organization.

<sup>114</sup> Under the 1998 Prevention of Terrorism (Temporary Provisions) Act, Section 20(1), “terrorism means the use of violence for the purpose of putting the public or any section of the public in fear.”

<sup>115</sup> Clive Walker, *Briefing on the Terrorism Act 2000, Terrorism and Political Violence*, Vol12 no. 2(2000),10, accessed August 24, 2012, <http://dx.doi.org/10.1080/095465500008427559>.

of the public in fear,” because in some instances this may come about as a result of non-political issues and still end up defined as terrorism. Section 1(1)(b), having been debated in the House of Lords, was amended to read “to intimidate the public or a section of the public,” and was set to be read alongside Section 1(1)(c), which contains the religious, political, or ideological linkage that is absent in Section 20 of the 1998 act.

Next, the definition in TA 2000 demands a serious level of violence; damage to property, interference to electronic systems, etc. According to Walker, despite this, it still allows for “endangerment of life without qualification,”<sup>116</sup> for example, protestors digging hazard tunnels. The definition covers several offences and forms the basis for other powers, including proscription. In 2005, Parliament appointed an independent reviewer, Lord Carlile of Berriew, to review the definition of terrorism found in TA 2000. In his elaborate analysis, the review concluded, *inter alia*:

There is no single definition of terrorism that commands full international approval; the current definition in the terrorism act 2000 is consistent with international comparators and treaties, and is useful and broadly fit for purpose, subject to some alteration; offences against property should continue to fall within the definition of terrorist acts; religious causes should continue to fall within the definition of terrorist designs; the existing law should be amended so that actions cease to fall within the definition of terrorism if intended only to influence the target audience, for terrorism to arise there should be intention to intimidate the target audience; the existing definition should be amended to ensure that it is clear from the statutory language that terrorism motivated by a racial or ethnic cause is included.<sup>117</sup>

Following the events of 9/11, several gaping holes were exposed in the legislation, thus calling for new terrorism laws to be introduced to cover the weaknesses. The post-9/11 terrorism legislation in the U.K. includes the following:

- The Anti-Terrorism, Crime and Security Act 2001 (ATCSA)
- The Prevention of Terrorism Act 2005 and Terrorism Act 2006
- The Counter-Terrorism Act 2008 (CTA)

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<sup>116</sup> Ibid., 10.

<sup>117</sup> The definition of Terrorism, A report by Lord Carlile of Berriew Q.C. Independent reviewer of terrorism legislation, presented to Parliament by the secretary of State for the Home Department, by Command of Her Majesty, (March 2007), 47–48.

- The Terrorist Asset-Freezing etc. Act 2010 (TAFSA 2010)
- The Protection of Freedoms Act 2012 (PFA 2012).

Key points to note regarding post-9/11 legislations are as follows:

- The majority of the laws are read in conjunction with, and by amendment of, TA 2000. The acts were prompted by such terrorist incidents as 9/11, the 2005 London bombing, and the 2007 Glasgow airport car bombing.
- Detention of foreigners indefinitely was introduced in 2001, but quashed by the House of Lords for incompatibility.
- The House of Lords quashed the admissibility of evidence obtained under torture.
- DNA sampling of terror suspects was introduced.
- The 2006 act extended the period for detention without charge to 28 days.

## **B. THE COURTS WEIGH IN**

In 1973, the U.K. joined the European Economic Community (EEC, which has since evolved into the EU. Since then, the dynamics of its legislative body have been altered in two ways. First, the court's power to overturn acts passed by Parliament was ruled unconstitutional and, second, any law passed by the EU is ruled to be "supreme over domestic laws to the contrary in areas within EU sovereignty."<sup>118</sup> The U.K is also a signatory to the ECHR and integrated its principles via the 1998 Human Rights Act. According to this act, U.K courts are to take account of all jurisprudence of the ECHR. While domestic courts may interpret the European Convention differently from the ECHR, if the result is radically inconsistent, the decision can be referred to Strasbourg for further interpretation. The ECHR gave leeway for derogation in certain cases where the security threat is considerable.

According to Morag, the ECHR allows for derogation and non-derogating control orders. Derogating orders imply that the liberties of an individual may be infringed, while non-derogating orders allow the state to dictate a set of limitations on freedom of movement and action.<sup>119</sup> The following cases are examples of the relationship between the ECHR and the courts.

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<sup>118</sup> Ibid., 54.

<sup>119</sup> Morag, *Comparative Homeland Security: Global Lessons*, 94.

## 1. Detention at Ports and Airports

Several complaints arose in the wake of the 1976 Prevention of Terrorism Act. In the case of *McVeigh, Neil, and Evans v. U.K.*,<sup>120</sup> the complainants challenged U.K. detention powers in the European court in Strasbourg. The three men were arrested in 1977 while returning to Liverpool from Northern Ireland; they were detained for forty-five hours for examination, under the 1976 order. During the course of their detention, they were interrogated, fingerprinted, and searched, but no exclusion orders were issued, nor were they charged with any offence. The European Commission ruled against the complainants that the detention did not breach Article 5 of the ECHR.<sup>121</sup> The court, however, upheld that Article 8<sup>122</sup> was breached because two of the applicants were not allowed to contact their spouses while in confinement.<sup>123</sup>

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<sup>120</sup> Application No. 8022/77, 8025/77 and 8027/77, Bernard Leo McVeigh, Oliver Antony O'Neill and Arthur Walter Evans against the United Kingdom, accessed August 30, 2012, Eur.H.r.Rep 829, 83/1981.

<sup>121</sup> ECHR Article 5 (1): Right to liberty and security. "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

<sup>122</sup> ECHR Article 8 : Right to respect for private and family life. The bill states that: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, Public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

<sup>123</sup> X, Y and Z v United Kingdom, application Nos. 8022/77, 8025/77, 8027/77 (Dec, 8, 1979) Commission decision, accessed September 12, 2012, <http://www.echr.coe.int> (then follow the "case law" hyperlink; follow "Hudoc" icon; under "ECHR document collect" check the decision box then enter App number.

In the case of *Lytte v U.K.*, the applicant was leaving England for Scotland. While Paul Lytte was detained for thirty-one hours, the European Court ruled as in the *McVeigh* case, where the application was found to be inadmissible. The commission raised the point that Lytte had not challenged his detention through a habeas corpus proceeding. As a result, the commission ruled that Article 5(4)<sup>124</sup> of the ECHR was not breached.

According to Brice Dickson, the “*McVeigh* and *Lytte* cases raise fundamental questions about the degree to which in practice the European Convention can protect people against arbitrary arrest.”<sup>125</sup> Dickson notes that while the European court’s ruling did not benefit either applicant, the U.K. legal position was left “internally inconsistent.”<sup>126</sup> This meant that unless there is reasonable suspicion about an individual’s involvement in terrorism, he cannot be arrested on the streets, but can be arrested at ports of entry or exit, regardless of citizenship.

As far as duration of detention is concerned, the court stressed that the applicants in the *McVeigh* case were only incarcerated for forty-five hours. In a previous ruling on *Brogan v U.K.*, the court viewed “four days as the maximum permitted period of detention under Article 5(3), which uses the word ‘promptly’ in relation to detention under Article 5(1) (c).”<sup>127</sup> Dickson explains that a strict timeline should be applicable to both Article 5(1) (c) and 5(1) (b), even though the word “promptly” does not appear in the latter.<sup>128</sup>

The exclusion orders were rendered non-operational by Parliament in 1998, although, within the statute, these powers could be rapidly reintroduced by Parliament.

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<sup>124</sup> Article 5(4) of the ECHR states that “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

<sup>125</sup> Brice Dickson, *The Detention of Suspected Terrorists in Northern Ireland and Great Britain*, (University of Richmond, Law Review, March 2009/volume 43,issue 3) ,accessed September 12, 2012, [http://Law review.richmond.edu/the-detention-of-suspected-terrorists-in-northern-ireland-and-great-britain/](http://Law%20review.richmond.edu/the-detention-of-suspected-terrorists-in-northern-ireland-and-great-britain/)

<sup>126</sup> Ibid.

<sup>127</sup> *Brogan V. United Kingdom*, European Court of Human Rights, 1988 Ser. A, No. 145-B, 11 EHRR 117. Under article 5(3) of the ECHR “ Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial Power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

<sup>128</sup> Dickson, *The Detention of Suspected Terrorists in Northern Ireland and Great Britain*, 12.

On the other hand, the port/airport powers were repealed in 2001, when the 2001 Terrorism Act came into force, thereby rendering sections 53 and 97 and Schedule 7 operational. [Schedule 7 deals with port and border controls and empowers officers to stop, question, and detain persons in ships, aircrafts within the port, and the border areas of Northern Ireland and Great Britain to determine whether the person is involved with acts of terrorism.<sup>129</sup> The schedule further restricts detention for more than nine hours unless Schedule 8, 32(1)<sup>130</sup> is satisfied.

## 2. Shoot-to-Kill Policy

In counterterrorism, the shoot-to-kill policy has been widely contested and is still controversial. Security forces have been accused of shooting terrorists dead to avoid long court procedures. From a different perspective, it has also been argued that shooting terrorists dead may be the only way of preventing them from detonating a bomb. According to Stephen Livingstone, in Northern Ireland more than 350 people were shot by security forces in questionable circumstances, though the Army and/or police claimed to have used reasonable force.<sup>131</sup> Cases of deliberate shooting were raised in the ECHR; for instance in *Kelly and others v U.K.*, the deceased were involved in a gunfight on 8 May 1987 with special air service (SAS) troops at Armagh. Seven families thereafter

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<sup>129</sup> Clive Walker, *Blackstone Guide to the Antiterrorism legislation*, 10.

<sup>130</sup> Terrorism Act 2000, Schedule 8 32(1) states that, Grounds for extension are satisfied if:

(1) A judicial authority may issue a warrant of further detention only if satisfied that—

(a) there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary as mentioned in sub-paragraph (1A), and

(b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously.

(1A) The further detention of a person is necessary as mentioned in this sub-paragraph if it is necessary—

(a) to obtain relevant evidence whether by questioning him or otherwise;

(b) to preserve relevant evidence; or

(c) Pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence.

<sup>131</sup> Stephen Livingstone, And Justice for All? The Judiciary and the Legal Profession in Transition, in Colin Harvey ,ed., *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford Portland: Hart Publishing 2000), 150.



sued the defense ministry, eliciting a response “stating *inter alia* that the force used was necessary to prevent the deceased from committing unlawful acts and to protect lives and personal safety.”<sup>132</sup>

Under the Northern Ireland Criminal Law Act (Northern Ireland) 1967, Section 3 states, “A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting the arrest or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large.”<sup>133</sup> The applicants alleged that their kin had been unjustly killed and no proper investigation was conducted to ascertain how they died. They invoked articles 2 (right to life), 6(1) (right to a fair trial), 13 (right to an effective remedy), and 14 (prohibition of discrimination) of the ECHR. The court unanimously found that Article 2 was violated while articles 6(1), 13 and 14 were not. The respondent state was ordered to pay the applicant’s cash penalties and expenses incurred.<sup>134</sup>

In other terrorism cases, the U.K. was similarly accused and criticised by the European court for violating Article 2 of the ECHR. The cases involved *Shanaghan v U.K.*,<sup>135</sup> *Finucane v U.K.*,<sup>136</sup> and *McShane v the U.K.*,<sup>137</sup> and in all instances, the U.K. was found to violate Article 2, which demands effective investigation of the deaths of the deceased.

In a somewhat different case in 1988 in Gibraltar, security forces shot three unarmed IRA members who were wrongly thought to be in the process of detonating a

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<sup>132</sup> Kelly and Others v U.K. Application no. 30054/96, accessed September 12, 2012, [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-68397-68865#{%22itemid%22:\[%22003-68397-68865%22\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-68397-68865#{%22itemid%22:[%22003-68397-68865%22]})

<sup>133</sup> Criminal Law Act (Northern Ireland) 1967, Section 3.

<sup>134</sup> Kelly and Others v U.K. Application no.30054/96.

<sup>135</sup> Shanaghan v. United Kingdom, Application no. 37715/97, accessed September 12, 2012, <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtsofhumanrights/nr/652>.

<sup>136</sup> Finucane v The United Kingdom, Application no.29178/95, accessed September 12, 2012, <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtsofhumanrights/nr/493>.

<sup>137</sup> McShane v The United Kingdom, Application no.43290/98, accessed September 12, 2012, <http://sim.law.uu.nl/sim/caselaw/Hof.nsf/1d4d0dd240bfee7ec12568490035df05/e7cf3e827b313b7941256bc800345fca?OpenDocument>.

bomb. The case was *McCann and Others v U.K.*, which again found the U.K in breach of Article 2. The judge explained that the operation in question was not planned and properly controlled in such a manner as to minimize the choice of lethal force.<sup>138</sup>

### **3. Internment and Special Powers**

The government of Ireland challenged the U.K. at the European Court in Strasburg regarding internment and the implementation of special powers in Northern Ireland. The case, *Ireland v U.K.*, was ruled against the U.K., stating that “this was a breach of Article 3<sup>139</sup> of the European Convention on Human Rights (ECHR,) and in particular referring to inhuman and degrading treatment or punishment.”<sup>140</sup> The decision highlighted the emphasis of Article 15, Part 2<sup>141</sup> of the ECHR that, regardless of emergency, states cannot derogate on laws that infringe on human rights.<sup>142</sup>

### **4. Right to Silence**

The 1998 act provides in sections 1 and 2 measures that facilitate the conviction of members of certain terrorist groups by limiting their right to silence when coupled with the opinion of a senior officer. The groups in question fall under the category of proscribed organizations. Walker posits that the strategy in Section 1 turns the police officer (above the rank of a superintendent) into an expert witness whose evidence is based on experience and judgement and not first-hand, factual information. The consequence of such evidence is that, first, it is not backed by any proof, and by virtue of the evidence coming from a senior police officer, does not mean that the court should

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138 *McCann and others v The United Kingdom*, Application no. 18984/91, accessed September 12, 2012, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943#{%22itemid%22:\[%22001-57943%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943#{%22itemid%22:[%22001-57943%22]}).

139 ECHR Article 3, Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

140 *The Republic of Ireland v. The United Kingdom*, Series A, No. 25 before the European Court of Human Rights, (18 January 1978).

141 ECHR Article 15, Derogation in time of emergency, (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

142 Warbrick C, *Emergency Powers and Human Rights: The U.K. Experience and Legal Instruments in the Fight against International Terrorism a Transatlantic dialogue*, ed. JWINC. Fijnaut, (Leiden Boston Martinus Nijhoff Publisher, 2004), 361–408.

accept it. Second, such opinions are easily objected to by the defense. In previous cases regarding the 1972 (Offences against the State) Act, Section 3,<sup>143</sup> suspects refuted association or links with proscribed organisations. As a result, courts declined to convict on the basis of such evidence, even though the opinion of the police remained admissible in court. According to Walker, criminals would easily circumvent this act by simply denying membership. Consequently, there would be no silence from which to draw any deduction.

Third, in the event that an officer's statement is allowed as evidence, then it is liable to questioning, in which case he would be compelled to release techniques of investigation plus any secret sources that could collaborate his evidence. This complicates matters, because the aspect of immunity in protecting one's sources comes into question. However, if this evidence is still allowed to continue, the judge could rule to stop the trial based on ECHR Article 6(1), arguing that part of the evidence is not being tested in court.<sup>144</sup> Campbell, on the other hand, posits that "the accused cannot be committed for trial, or be found to have a case to answer, or be convicted, solely on the

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<sup>143</sup> Under the Offences against the state Act 1972, Section 3: Evidence of membership of unlawful organization states that:

(1) (a) Any statement made orally, in writing or otherwise, or any conduct, by an accused person implying or leading to a reasonable inference that he was at a material time a member of an unlawful organization shall, in proceedings under Section 21 of the Act of 1939, be evidence that he was then such a member.

(b) In paragraph (a) of this subsection "*conduct*" includes omission by the accused person to deny published reports that he was a member of an unlawful organization, but the fact of such denial shall not by itself be conclusive.

(2) Where an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said Section 21, states that he believes that the accused was at a material time a member of an unlawful organization, the statement shall be evidence that he was then such a member.

(3) Subsection (2) of this section shall be in force whenever and for so long only as Part V of the Act of 1939 is in force.

<sup>144</sup> Clive Walker, *The Bombs in Omagh and Their Aftermath: The Criminal Justice (Terrorism and Conspiracy) Act 1998*, *Modern Law Review* 62, (1999), 884–885.

basis of the police statement.”<sup>145</sup> He, however, points out that the act does not stipulate the requirement of further collaborating evidence and thus convictions may be obtained arising from supporting evidence.

### **C. SPECIAL POWERS (PROSECUTORIAL MEASURES IN NORTHERN IRELAND)**

#### **1. Diplock Courts<sup>146</sup>**

Diplock trials were emergency measures introduced in Northern Irish courts following Lord Diplock’s government-commissioned investigation in 1972. The commission argued that juries were susceptible to intimidation from a highly sectarian society and thus recommended that a single judge sit as both judge and jury in terrorism cases.<sup>147</sup> Thus juries in Northern Ireland were excluded from the special courts, which were conducted by one judge. This approach became controversial, especially because it was contrary to the principle of a fair trial and common-law practice.<sup>148</sup> Jackson and Doran posit that in common-law practice, juries are the “most potent symbol, the fulcrum of the adversarial trial system.”<sup>149</sup> These measures were argued to be biased significantly against the accused and were evident in the number of guilty pleas witnessed in Northern Ireland, as compared to England and Wales.<sup>150</sup> The Diplock trials continued in Northern Ireland until 2005, when the IRA announced an end to its long war. The trials ceased in 2007, but exceptional cases can still be heard without juries.<sup>151</sup>

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<sup>145</sup> Campbell B C L, Two Steps Backwards, The Criminal Justice (Terrorism and Conspiracy) Act 1998, *Criminal Law review*, (1999), 943–944.

<sup>146</sup> ‘Diplock’ is derived from Lord Diplock who recommended the introduction of judge only trials in Northern Ireland in 1972, (London; HMSO, 1972) CMnd 5185.

<sup>147</sup> BBC news, Diplock Courts , accessed September 12, 2012, [http://news.bbc.co.uk/go/pr/fr/-/2/hi/programmes/law\\_in\\_action/6265734.stm](http://news.bbc.co.uk/go/pr/fr/-/2/hi/programmes/law_in_action/6265734.stm), Published: 2007/07/03 14:44:29 GMT.

<sup>148</sup> Jackson J and Doran S, *Judge Without Jury: Diplock Trials in the Adversary System*: (Oxford: Clarendon Press, 1995), 509–510.

<sup>149</sup> Ibid., 1.

<sup>150</sup> Ibid., 41.

<sup>151</sup> The *Justice and Security Act 2007* states that: in Northern Ireland, only in exceptional cases, the Director of Public Prosecutions for Northern Ireland will have discretionary power to issue a certificate stating that a trial is to take place without a jury if certain conditions are met.

## 2. Supergrass Trials in Northern Ireland

According to David Bonner, a supergrass “denotes someone who has participated in a number of criminal [activities], who not only gives information to the police about them, but also agrees to give evidence in court against a significant number of persons alleged to be his accomplices in crime.”<sup>152</sup> The supergrass method emerged in the 1980s, and by 1998, twenty-seven criminal defendants had agreed to cooperate against their organizations. Bonner notes, however, that only ten supergrasses remained up to the completion of a trial based on their evidence. Fifteen retracted midway, allegedly because of threats against family members. Another lot withdrew because their safe houses had been discovered by terrorist groups.

Critics of the supergrass method point out that, first, granting immunity to a person who is accusing another person of similar offences is objectionable. Second, supergrasses have been accused of colluding with police officers in altering evidence, and in some cases, inserting particular names in their evidence. Third, when the number of individuals named by a supergrass is too large, arresting suspects takes time and as a result, they end up being coached and trained before appearing in front of a magistrate. This process easily misleads the judge for lack of collaborative evidence.<sup>153</sup>

The supergrass method proved successful at first because it led to the arrest of 300 IRA members, but later, when challenged in appellate court, the evidence was easily quashed. A case in question is the 1986 conviction of eighteen IRA members based on evidence from a one of the first supergrasses, known as Christopher Black. The convictions were later quashed and the suspects released.<sup>154</sup> Another downside to the method is that terrorist organisations developed a counter method, where they offered amnesties to supergrasses to withdraw their statements and evidence. Despite heavy criticism, the method is still applied. In April 2012, a British terrorist who was jailed back

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<sup>152</sup> David Bonner, Combating Terrorism: Super grasses Trials in Northern Ireland, *The Modern Law Review*, Volume 51, issue 1 (January 1988), 23.

<sup>153</sup> *Ibid.*, 34.

<sup>154</sup> BBC News, IRA Members jailed for 4000 years (1983), accessed August 6, 2012, [http://news.bbc.co.uk/onthisday/hi/dates/stories/august/5/newsid\\_2527000/2527437.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/august/5/newsid_2527000/2527437.stm)

in 2005 for plotting to blow up an airplane had his thirteen-year term commuted to two years for helping U.S. intelligence foil a plan to attack the New York subway.<sup>155</sup>

#### **D. SPECIAL POWERS (LAW-ENFORCEMENT MEASURES)**

Terrorism laws in the U.K vary from those that exclusively targeted Northern Ireland to those that covered the whole country. Laws covering Northern Ireland had broader law-enforcement powers and somewhat different procedures. Even though terrorist acts were also recorded in other regions, the major perpetrators originated in Northern Ireland. Some of the special provisions that exclusively targeted Northern Ireland are tabulated below.

##### **1. Stop and Search**

Security forces in Northern Ireland had special powers of stop and search that were granted by Parliament. The powers applied to any person, without time limitation, as long as the search was related to a terrorist incident. Searches of vehicles and premises required only reasonable suspicion from the security forces. From 1994 to 1996, the provisional IRA intensified their campaign, triggering the passage of the Criminal Justice and Public Order Act 1994 and the Prevention of Terrorism (Additional Powers) Act 1995. Powers were extended to the mainland and authorised police to randomly stop and search vehicles for the purpose of preventing terrorism. These also included measures such as cordoning areas for the purpose of investigations without prior judicial authority.<sup>156</sup>

##### **2. Detention and Wider Powers of Arrest**

The U.K police were also granted wider powers of arrest and could hold suspects for longer periods in regard to any alleged terrorism incident. The difference with the

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<sup>155</sup> Martin Betham, British Terror Super Grass Sentence Cut by Two Years, *London Evening Standard*, (16 April 2012), accessed September 12, 2012, [www.standard.co.uk/news/uk/british-terror-supergrass-sentence-cut-by-two-years-7647957](http://www.standard.co.uk/news/uk/british-terror-supergrass-sentence-cut-by-two-years-7647957).

<sup>156</sup> David Bonner, The United Kingdom's Response to Terrorism: the Impact of Decisions of European Judicial Institutions and of the Northern Ireland 'Peace Process'. In *European Democracies against Terrorism. Governmental Policies and Intergovernmental Cooperation*, ed. F Reinares (Dartmouth, Hants: Ashgate 2000), 31–71.

existing criminal system was that individuals could only be arrested if reasonable suspicion existed for a particular offence and could only be detained for up to thirty-six hours without charge. This period was extendable to ninety-six hours through a judicial hearing. By contrast, the 1989 Prevention of Terrorism Act (PTA) granted security forces the power to arrest individuals if there was “reasonable cause to suspect that the person was or had been concerned in the commission, preparation or instigation of acts of terrorism, or after being stopped at a port or airport.”<sup>157</sup> In respect to detention, the police could hold a suspect for up to forty-eight hours without judicial approval, which could be extended by five days with the secretary of state’s approval.<sup>158</sup>

Under TA 2000, Section 41(1) “a constable may arrest without a warrant any person whom he reasonably suspects to be a terrorist.”<sup>159</sup> In Section 41(3),<sup>160</sup> read together with the 1984 Police and Criminal Evidence Act (PACE) Annex B (a) (6), an arrested person may be held no longer than forty-eight hours after arrest. The section specifies that the detainee has a right to a solicitor and to inform a named person about his detention. However, after TA 2000 was passed, it essentially granted permanency to the seven-day, pre-charge detention provision previously found in the Prevention of Terrorism Act. According to Morag, this period was further extended to fourteen days in 2003, following a rise in international terrorism. The government sought further to increase the period to ninety days, but to no avail. In Terrorism Act 2006, the pre-charge detention period was increased to twenty-eight days. Under the act, detention can be authorised by a magistrate only under certain conditions; beyond fourteen days, the authority is granted by a high-court judge.<sup>161</sup>

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<sup>157</sup> Ibid., 43.

<sup>158</sup> Prevention of Terrorism Act, Section 14.

<sup>159</sup> Terrorism Act 2000, Section 41 Arrest without warrant. (1) A constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist.

<sup>160</sup> Terrorism Act 2000, Section (3) Subject to subsections (4) to (7), a person detained under this section shall (unless detained under any other power) be released not later than the end of the period of 48 hours beginning—

(a) with the time of his arrest under this section, or

(b) if he was being detained under Schedule 7 when he was arrested under this section, with the time when his examination under that Schedule began.

<sup>161</sup> Morag, *Comparative Homeland Security: Global Lessons*, 93.

### 3. Internment and Interrogations

According to Antonio Vercher, “internment is an executive measure, meaning detention without trial of persons believed to be a danger to the state.”<sup>162</sup> Vercher explains that the word “internment” was found in the British legal system, but was replaced by the word “detention” through an extrajudicial process. In Northern Ireland, “internment” was used during the violence between the Catholics and Protestants. It was used as a preventive or extrajudicial repressive measure to curb an intended or ongoing uprising and as a political tool to effect a solution with the IRA. The other intent of internment was introduced by the Detention of Terrorists Order of 1972, as a kind of judicial process that dealt with terrorists who could not be handled through the normal criminal courts, either because of inadmissibility of evidence or because of witness intimidation.<sup>163</sup>

In the early 70s, in-depth interrogations took place that entailed harsh techniques such as hooding and sleep deprivation. These techniques were stopped and declared unlawful through the 1972 Parker report.<sup>164</sup> In 1973, the Emergency Provisions Act once again legalized the practice, amid widespread resentment. In 1975, internment was abolished through the Northern Ireland Emergency Provisions Act 1975 (Amendment) following the Gardener report on civil liberties and human rights.<sup>165</sup>

### 4. Proscription

In the U.K, organizations are proscribed by a statutory order from the secretary of state and if listed in the act under Schedule 2. Before 2000, proscribed organizations were from Northern Ireland, but later, based on TA 2000, both foreign and domestic groups

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<sup>162</sup> Vercher, *Terrorism in Europe*, 17.

<sup>163</sup> Ibid., 17–18.

<sup>164</sup> Report of the Committee of Privy Counselors Appointed to Consider Authorized Procedures for the Interrogations of Persons Suspected of Terrorism, Cmd No. 4901, accessed September 12, 2012, <http://Cain.ulst.ac.uk/hmso>.

<sup>165</sup> Report of a Committee to Consider in the Context of Civil Liberties and Human Rights, Measures to deal with Terrorism in Northern Ireland, Cmd. No 5847, accessed September 12, 2012, <http://cain.ulst.ac.uk/hmso>.



were included. Section 5 of TA 2000<sup>166</sup> established the Proscribed Organization Appeal Commission (POAC), which was charged with the responsibility of scrutinizing proscription orders. However, Walker points out that a weakness found in the POAC is its lack of appeal powers. In Section 5(3),<sup>167</sup> the POAC is restricted to principles applicable for judicial review. Walker argues that these powers should be vested in the POAC so as to allow the organization to consider their decisions. As a result, he contends, that there is little difference from the 1989 act, where the verdict of the secretary of state was also liable to judicial scrutiny. Another area of concern is the proscription of foreign organizations. By virtue of Section 1(2), foreign groups may also be proscribed in the U.K. Walker comments that, hopefully, before any foreign group is listed, the government should have gathered incriminating evidence of criminal activity (including universal offences) within the U.K.<sup>168</sup>

In April 2002, before the High Court of Justice, three separate applicants launched a claim challenging the proscription of their organizations under Part II, Schedule 2 of the TA 2000. The organisations in question were the People's Mujahidin of Iran (PMOI), the Kurdistan Workers Party (PKK) and the Lashkare Tayyarah (LeT). All three parties were proscribed by virtue of the TA 2000 order, and in each instance they challenged the lawfulness of the proscription, contending that they ought to be granted an immediate judicial review instead of a set procedural appeal through POAC. The case was dismissed, arguing that POAC was the right channel through which appeals challenging the legality of proscription should be handled.<sup>169</sup>

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<sup>166</sup> Terrorism Act 2000, Section 5, De-proscription: appeal.

(1) There shall be a commission, to be known as the Proscribed Organizations Appeal Commission.

<sup>167</sup> Terrorism Act 2000 Section 5(3,) The Commission shall allow an appeal against a refusal to de-proscribe an organization if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review.

<sup>168</sup> Clive Walker, Briefing on the Terrorism Act 2000, Terrorism and Political Violence, 12:2(2000), 15–17, accessed August 24, 2012, <http://dx.doi.org/10.1080/09546550008427559>.

<sup>169</sup> Application Nos: co/2587/2001,co/4039/2001 and co/878/2002, accessed September 12, 2012, <http://hudoc.echr.coe.int/sites/erg/pages/search.aspx?!=001-57721>.

## **E. REPEAL OF THE NORTHERN IRELAND EMERGENCY PROVISIONAL ACT 1978**

The ECHR persistently condemned the U.K regarding the Northern Ireland EPA Act 1978 and, in particular, sections 11 and 14, which dealt with provisions regulating arrest. The U.K eventually repealed the act in August 1991. In a suit against the U.K. launched by Fox, Campbell, and Hartley, the applicants alleged a violation of Article 5(1) of the ECHR. Under Section 1(1) of the 1978 act, “any constable may arrest without a warrant any person whom he suspects of being a terrorist.”<sup>170</sup> The applicants did concur with their arrest as being lawful under Section 11(1), but argued that their arrest and detention were not based on reasonable suspicion, thus contradicting Article 5(1)(c). The article contains the phrase “reasonable suspicion,” which the court argued safeguards against random arrest and detention and assumes the existence of factual information that satisfies a third party that the arrested person is in violation of the law. Ultimately, the ECHR ruled that Article 5(1) was breached.

The 1978 provision was eventually repelled and the Northern Ireland Emergency provision Act 1991 adopted. In *Brennan v U.K.*, filed with the ECHR, the applicant complained of having been denied access to his lawyer in his initial period of arrest and not being able to see him in private, thus depriving him of a fair trial. Section 45(1) of the 1991 act provides that an arrested person can access a lawyer in the presence of a uniformed policeman only. Brennan was arrested on 21 October 1990 for the murder of an Ulster soldier. He was interviewed and held until 25 October 1990. The applicant was allowed to see his solicitor on 23 October, at which time there was a uniformed policeman present during the interview. *Inter alia*, Section 45 of the 1991 act specifically

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<sup>170</sup> Application no. 12244/86, 12245/80 and 122383/86, accessed September 12, 2012, <http://hudoc.echr.coe.int/sites/erg/pages/search.aspx?!=001-57721>.

deals with the individual's right to a solicitor.<sup>171</sup> The government of the U.K relied on Section 45 to deny him access to a lawyer. However, the applicant argued that he could not see his solicitor for a whole day, and that in his initial confessions, no legal advice was provided. He cited this as a breach of Article 6(1)<sup>172</sup> and Article 6(3)(c)<sup>173</sup> of the convention. The court held that a violation of the two articles was committed and thus the state was required to pay the applicant for costs and expenses to the tune of 6,920.62 pounds sterling.<sup>174</sup>

## F. CONCLUSION

Anti-terrorism laws in the U.K were initially enacted specifically to target domestic terrorism, but were extended to international terrorism in the late 1990s. The U.K employed emergency legislation, regular legislation, and law-enforcement emergency executive orders in its legal framework for combating terrorism. Special legislation included prosecutorial measures (such as the Diplock courts), law-enforcement measures (such as extended detentions and increased security-force powers),

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<sup>171</sup> Northern Ireland Emergency Provision Act 1991 states that:

A person who is detained under the terrorism provisions and is being held in police custody shall be entitled if he requests, to consult a solicitor privately.

A person shall be informed of the right conferred on him by subsection (1) as soon as practicable after he has become a person to whom the subsection applies.

A request made by a person under subsection (1), and the time at which it is made shall be recorded in writing unless it is made by him while at a court and being charged with an offence if a person makes such a request, he must be permitted to consult a solicitor as soon as practicable except to the extent that any delay is permitted by this section.

<sup>172</sup> European Convention on Human Rights, Article 6 (1), Right to a fair trial.

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

<sup>173</sup> European Convention on Human Rights ,Article 6(3)(c):

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

<sup>174</sup> Brennan v U.K. application no 39846/98, accessed September 12, 2012, <http://sim.law.uu.nl/sim/caselaw/Hof.nsf/1d4d0dd240bfee7ec12568490035df05/de316da56c09b1c3c1256ae8002a9df8?OpenDocument>.

and other temporary provisions. In the aftermath of the 9/11 attacks, several laws were introduced hurriedly that infringed on human rights.

According to Oehmichen, U.K. terror legislation has been found to limit the following human rights: “Right to liberty of movement (extended police custody and detention on remand); inviolability of the home (house searches, bugging operations); right of privacy (telephone tapping); freedom of association; prohibition of discrimination/equality before the law (special treatment of foreigners).”<sup>175</sup> These human-rights violations have been dealt with by both the domestic and EU courts and have gradually shaped the state’s response. In essence, the judiciary has kept the state under check in regards to executive powers and human-rights violations.

The U.K has had extensive debate on the definition of terrorism and finally come to an agreement that no single definition commands the full approval of the international community. However, the definition must be “consistent with international comparators and treaties, and [should be] useful and broadly fit for purpose, subject to some alteration.”<sup>176</sup> The U.K.’s response to terrorism can therefore be viewed from the manner in which they have defined terrorism, which is broad and forms the basis of all legal actions against terrorism suspects. It accords flexibility, especially in the proscription of terrorist organizations, because the acts of terrorism must be viewed from political, religious, or social goals. The legislation has evolved over time, owing to interaction between the U.K., EU, and ECHR. The cases analyzed also indicate that a state can be held liable by a competent court for violating human-rights principles, regardless of the situation. States cannot therefore derogate their obligation of upholding these principles for security or emergency reasons.

The evolution and progress of legislating terrorism in the U.K is relevant to the Republic of Kenya because of historical linkages and common-law practice. Kenya moved into Somalia last year to fight an Al Qaeda surrogate, Al Shabaab, and in October 2012 enacted its first counterterrorism law (Prevention of Terrorism Act 2012). There is

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<sup>175</sup> Oehmichen, *Terrorism and anti-terror legislation*, 305.

<sup>176</sup> The definition of terrorism, A report by Lord Carlile report, 47.

similarity between the two countries' terrorism legislation. The 2003 Suppression of Terrorism bill was almost verbatim to the U.K Terrorism Act 2000, while the 2012 Prevention of Terrorism Act has deviated a bit with several clauses having been domesticated. Controversial clauses that were challenged in U.K domestic and EU courts have also found their way into the Kenyan act and range from proscription, right of silence, detention, and wider powers of arrest to internment and interrogation. The Republic of Kenya should borrow a leaf and adjust the clauses beforehand; otherwise similar strategies will be used to quash terrorist cases in future.

In regard to human-rights violations, unlike the U.K., where the EU has a role in checks and balances, in Kenya the violations are handled domestically only. It is therefore upon the government of Kenya to legislate or amend clauses that have been previously challenged and found wanting in the U.K. before getting embroiled in similar court battles. The state is a member of the East African Community (EAC), which has several counterterrorism initiatives, but no human-rights court similar to the ECHR. Regional bodies have been known to promote the acceptance of competent international human-rights organizations in addition to encouraging fellow member states to adhere and put into practice a human-rights approach to counterterrorism.<sup>177</sup> It is upon the Republic of Kenya to initiate a regional approach similar to the European Union's in order to check rogue administrations within the region.

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<sup>177</sup> *United Nations General Assembly Resolution 60/288, A/RES/60/288, (September 8, 2006).*

## IV. TERRORISM LEGISLATION IN KENYA

Counterterrorism legislation in Kenya has its roots in the last years of British colonial rule, which flavored the focus and practice of counterterrorism law for some decades even after independence. This ambivalent legacy, as well as Kenya's post-independence efforts to deepen and broaden the rule of law, including genuine civil-liberties protections, left Kenya with a legal framework that was acutely ill-prepared for the kinds of international terrorist threats that came about with the end of the Cold War and the rise of Islamist extremism. This chapter traces the development of Kenya's main counterterrorism acts, the Suppression of Terrorism Bill of 2003 and the Prevention of Terrorism Act of 2012, two rather different approaches to the demands of contemporary counterterrorism and Kenyan democracy.

### A. BACKGROUND

In October 1952, the British government, then administering Kenya as a colony, declared a state of emergency in the Colony of Kenya to contain the increasing—and increasingly violent—activities of Mau Mau fighters. Britain deemed as “terrorists” the Mau Mau fighters who had killed Chief Waruhiu on 7 October 1952, as well as 2,000 African civilians and 32 white settlers. In a debate at the House of Lords, the Lord Earl of Munster stated: “Mau Mau terrorism is carefully planned, centrally directed and its object is to destroy all authority other than Mau Mau.”<sup>178</sup>

In rationalizing the imposition of the state of emergency, the Earl of Munster continued:

Action against these leaders was imperative. The ordinary process of the law is necessarily slow. In present conditions in Kenya, it would have allowed time and opportunity for those behind the outrages to organize widespread disturbances in what number of innocent people might have been killed. The declaration of the emergency has enabled the Kenya Government to detain the ringleader and their lieutenants about 130 together.<sup>179</sup>

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<sup>178</sup> House of Lords Hansard HL De6 (21 October 1952) vol 178 cc 789–91 3.23 pm, accessed January 20, 2012, <http://hansard.millbankssystems.com/lords/1952/oct/21/mau-mau-terrorism-in-kenya>.

<sup>179</sup> Ibid.

Thus, the Kenyan Legislative Council was permitted to pass the Emergency Regulations of 1952. The regulations made possession of ammunition and firearms a capital offence. Moreover, the regulations also shifted the burden of proof of lawful authority or justification for possessing firearms or ammunitions to the accused person, contrary to settled criminal practice, where the burden of proof rests with the prosecution. The regulation declared Mau Mau a terrorist organization and criminalized membership thereof. These regulations created a specialized court, the Court of Emergency Assize, to hear and expedite cases against Mau Mau suspects. The court conducted 1211 trials between 1953 and 1958, in which 2609 suspects were tried on capital offences linked to the Mau Mau group. Among these cases 1574 were sentenced to hang.<sup>180</sup> For example, in *Regina vs Dedan Kimathi Wachiuru*,<sup>181</sup> a defendant charged under the Emergency Regulations for being a member of the Mau Mau and possessing a firearm and ammunition (but no direct acts of terrorism or “conventional” criminal acts) was tried in the court of emergency assize, presided over by Chief Justice K.K. O’Connor. He was convicted and sentenced to death.

In light of these cases and considering that the Mau Mau revolution was an anti-colonial revolt against the British who had stripped the natives of their land, the measures put in place were heavy-handed and violent, to say the least. The legislation completely abrogated the basic civil-liberty protections that form the heart of any criminal code in a democratic state. Indeed, the British considered national security to be more important than colonial civil liberties and thus unleashed both the military and the special courts, outside the normal channels of justice and civic responsibility, to deal with the so-called domestic terrorists. These measures set the tone for future government actions even after independence.

Since the Mau Mau revolution, Kenya has changed, as has the nature of terrorism. For one thing, Kenya has been a target of both domestic and international terrorism.

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<sup>180</sup> David Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire*, (W W Norton and Company, New York, 2005), 151–170.

<sup>181</sup> Kenya Law Review, (1956)eKLR13, accessed July 12, 2012, [http://www.kenyalaw.org/Downloads\\_FreeCases/EMERGENCY%20ASSIZE%20CRIMINAL%20CASE%20NO%20%2046%20OF%201956%20Final.pdf](http://www.kenyalaw.org/Downloads_FreeCases/EMERGENCY%20ASSIZE%20CRIMINAL%20CASE%20NO%20%2046%20OF%201956%20Final.pdf)

Today, it must balance its counterterrorism measures with its obligations to protect the fundamental civil liberties of its citizens. That is, terrorism legislation is meant to address the crime of terror and mitigate the risks posed. However, these are but the initial pieces of the puzzle; the evidence arising from terrorism is usually in the form of plotting the mission and thus difficult to detect and prevent. Legislation should therefore encompass measures that are both prophylactic and preemptive in nature because ordinary criminal justice system is not. These measures should be able to define the crime of terrorism, proscribe terror organizations, tackle terrorist finances and property, and stipulate law-enforcement powers.

What's more, Kenya is bound by its obligations to and within the international community. UN Security Council Resolution 1373 of 2001 also requires states to criminalize offences related to the planning and preparation of terrorist acts and including the perpetrators themselves. The instruments obligate states to domestically criminalize the offenses, deal with perpetrators of terror under the approved law, and collaborate with other states in prosecuting or extradition.<sup>182</sup> The Republic of Kenya has so far acceded to all thirteen UN conventions under Resolution 1373 and, thus, must conform its domestic law accordingly.<sup>183</sup> The key objects of the legislation are to:

- Provide an appropriate legal framework for the prevention, investigation and punishment of terrorism and terrorist financing and hence promote law and order and national security.
- Domesticated in part the various counterterrorism conventions to which Kenya is a signatory—the UNSC Resolutions and FATF recommendations and thereby enhance Kenya's satisfaction of its international obligations.

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<sup>182</sup> Ibid., 11.

<sup>183</sup> UN Conventions under Resolution 1373; 1. The convention on offences and certain other acts committed on board Aircraft (1963); 2. Convention for the suppression of unlawful seizure of aircraft (1970); 3. Convention for the suppression of Unlawful Acts against the safety of civil aviation (1971); 4. Convention on the prevention and punishment of crimes against internationally protected persons including Diplomatic Agents (1973); 5. International Convention against the Taking of Hostages (1979); 6. Convention on the Physical Protection of Nuclear Material (1980); 7. Protocol for the suppression of unlawful Acts of violence at airports serving international civil aviation, supplementary to the convention for the suppression of unlawful Acts against the safety of civil aviation (1988); 8. Protocol for the Suppression of Unlawful Acts against the safety of fixed platforms located on the continental shelf (1988); 9. Convention on the marking of plastic Explosives for the purpose of detection (1991); 10. Intentional convention for the suppression of terrorist bombings; 11. International convention for the suppression of the financing of terrorism (1999); 12. International Convention for the suppression of Acts of Nuclear Terrorism (2005).



In this framework of requirements for security and liberty, Kenya had undertaken two notable efforts in the name of counterterrorism legislation.

## **B. THE SUPPRESSION OF TERRORISM BILL 2003**

In the beginning of the new millennium, the Republic of Kenya had just witnessed one of the most devastating terror attacks in the country. The 1998 U.S. embassy bombing was followed by the 2003 Kikambala bombing in Mombasa; these two incidences marked the dawn of international terrorism in Kenya. In a bid to criminalize this acts of terror, the then– minister of justice and constitutional affairs tabled the Suppression of Terrorism Bill of 2003<sup>184</sup> (Supplement No. 38 of the *Kenya Gazette*) in Parliament. The bill immediately stirred up controversy, as had the acts that prompted it. The government’s reaction was heavy handed, in part because that was the mood of the day and in part because the 1952 act established the precedent that an iron fist meant the authorities were dealing with the situation. Ultimately, its flaws undid the bill—though not so fatally as to preclude a successor law nearly a decade later.

These analyses will focus on several problem areas that elicited more controversy than others from human-rights organizations such as Amnesty International, the Kenya Law Society, lawyers in their individual capacities, the clergy, and the general public.

- The definition of terrorism—The entire bill/act is based on the definition of terrorism. An imprecise definition distorts the whole legislation and renders major clauses as being controversial.
- Terrorism offences—First, what is and what is not an offence under the bill/act is highly dependent on the definition. Second, powerful foreign states can easily influence smaller states based on their interests if the offences are not clear. Third, this is an area that most civil liberties are bound to be violated because domestic law enforcement agencies have powers bestowed upon them to deal with the crime of terrorism and therefore decide what falls under this category of crime.
- Declared terrorist organizations—Declaring an organization or an individual as a terrorist entity is also dependent on a precise definition of terrorism. It is an area that is prone to abuse, especially if there is no control mechanisms stipulated before hand. These powers of declaring an organization are usually executive powers.

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<sup>184</sup> Kenya Gazette Supplement, *The Suppression of Terrorism Bill, 2003*, 38 Kenya Gazette Supplement Nairobi, (30 April 2003 at 443), Clause 3.

- Law-enforcement powers—Counterterrorism is conducted by law-enforcement officers. In Kenya, Police officers have been known to be highly corrupt. If these powers have no checks and balances then terrorism will still flourish in the eyes of corrupt officers. These powers if unchecked also violate civil liberties.
- Rights and freedoms—In the case of Kenya, certain human rights are enshrined in the constitution and cannot be taken away. Those with caveats have safeguards within the system and must therefore be handled with care.

## **1. Definition of Terrorism**

The definition of terrorism is important because only an offense that meets this definition falls under the strictures of the law. In a sense, the definition establishes the threshold of “terrorism” from a legal perspective. For various reasons, however, even this vital first step is a matter of controversy, both within Kenya and internationally. For example, the following treaties guide the formulation of the definition of terrorism:

- The 1997 International Convention for the Suppression of Terrorist Bombings-
- 1998 United Nations resolution 1189
- 1999 United Nations resolution 1267
- 1999 International Convention for the Suppression of the Financing of Terrorism
- 2001 United Nations resolution 1368
- 2001 United Nations resolution 1373
- 2004 United Nations Resolution 1566
- 2005 United Nations Resolution 1624
- 2006 United Nations Counter-terrorism strategy

None of these documents provides a clear definition of terrorism, and no globally accepted standard meaning has coalesced. To be sure, in 2010, UN Special Rapporteur

Martin Scheinin gave a model definition<sup>185</sup> and opines that any definition that goes beyond the model prescribed “would be problematic from a human-rights perspective.”<sup>186</sup> Therefore, the definition of terrorism must at least be generally in line with specified international norms, such that they are.

In the 2003 Suppression of Terrorism Bill, terrorism is defined as:  
the use or threat of action where –

- 3(1)(a) The action used or threatened –
  - (i) involves serious violence against a person;
  - (ii) involves serious damage to property;
  - (iii) endangers the life of any person other than the person committing the action;
  - (iv) Creates a serious risk to the health or safety or the public or a section of the public; or
  - (v) Is designed seriously to interfere with or seriously disrupt an electronic system;
- (b) The use or threat is designed to influence the government or to intimidate the public or a section of the public;  
and
- (c) The use or threat is made for the purpose of advancing a political religious or ideological cause; provided that the use or threat of action which involves the use of –
  - (i) Firearms or explosives;

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<sup>185</sup> Human Rights Council, Sixteenth session, A/HRC/16/51, 22 December 2010. Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development. Terrorism means an action or attempted action where:

1. The action:

- (a) Constituted the intentional taking of hostages; or
- (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
- (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and

2. The action is done or attempted with the intention of:

- (a) Provoking a state of terror in the general public or a segment of it; or
- (b) Compelling a Government or international organization to do or abstain from doing something;  
and

(3) The action corresponds to:

- (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
- (b) All elements of a serious crime defined by national law.

<sup>186</sup> Human Rights Council, Sixteenth session, A/HRC/16/51, (22 December 2010), para 28, 14.

- (ii) Chemical, biological, radiological or nuclear weapons;  
or
- (iii) weapons of mass destruction in any form shall be  
deemed to constitute terrorism whether or not  
paragraph (b) is satisfied.
- (2) In this section –
- (a) “Action” includes action outside Kenya;
- (b) A reference to any person or to property is a reference  
to any person, or to property, wherever situated;
- (c) A reference to the public includes a reference to the  
public of a country other than Kenya; and
- (d) ‘the government’ means the government of Kenya or of  
a country other than Kenya.<sup>187</sup>

This definition was critiqued for being vague, overbroad, and unclear, particularly in the articulation of the elements of the crime of terrorism. . The East African Law Society described the definition as “so absurdly wide as to mean anything and thus nothing.”<sup>188</sup> The organization argued that incidents such as bar brawls, domestic quarrels and college strikes could easily be misconstrued as terrorist acts if the definition were adopted in its current form.<sup>189</sup>

Further, clauses 3(a) (b) and (c) are conjunctive, and therefore must be satisfied subject to 3(c) (i) (ii) and (iii). These clauses designate use of weapons of mass destruction, chemical, biological or nuclear weapons, explosives and firearms as terrorism regardless of 3(b). In clauses 3 (b), where it states; “The use or threat is designed to influence the government or to intimidate the public or a section of the public” the word “influence” in the statement was argued to be so broad as to cover, for example, teachers and nurses striking for higher salaries. Another definition that had a loophole was the reference to “religious or ideological causes” found in clause 3 (1) (c). Clive Walker argues that “‘religious’ seems superfluous and might cause problems by blurring into personal disputes, such as family or clan disputes about an arranged marriage or dowry.”<sup>190</sup> “Ideological causes,” on the other hand, could include political

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<sup>187</sup> Suppression of terrorism bill, 2003, Clause 3.

<sup>188</sup> EALS Statement on Kenya’s draft Anti-terrorism Law, (Legal brief May 29, 2003).

<sup>189</sup> Ibid.

<sup>190</sup> Walker, *Blackstone’s Guide to The Anti-Terrorism Legislation*, 10.

activists such as anti-abortion organizations targeting government policies. According to Amnesty International, if the definition is vague “how would a court of law adjudicate a case of incitement to commit an act of terrorism?”<sup>191</sup> An ill-crafted definition opens doors for abuse and can be utilized by oppressive regimes for political gains. It also gives sweeping discretionary powers to police and customs officials to establish whether an act is crime of terror under the proposed bills.

## **2. Terrorism offences**

Clause 8 covers incitement of offences outside the country and states as follows;

- (1) A person shall be guilty of an offence if—
  - (a) he incites another person to commit an act of terrorism wholly or partly outside Kenya; and
  - (b) the act would, if committed in Kenya, constitute an offence under this or any other Act.
- (2) A person guilty of an offence under this section shall be liable to any penalty to which he would be liable on conviction of the relevant offence referred to in subsection (1)(b)
- (3) For the purposes of subsection (1), it is immaterial whether or not the person incited is in Kenya at the time of the incitement.<sup>192</sup>

The debate in regard to this clause was that arrests could easily be influenced by the foreign policy of the country. Subsection (a) also suggests that the offence may be committed by words alone regardless of place of execution. Furthermore, as previously mentioned, the definition of terrorism was found to be vague, therefore the clause opens doors for abuse by prosecutors who could interpret the word “incite” in whichever way they like.

## **3. Declared Terrorist Organizations**

Part III clause 9 of the 2003 bill states that:

- (1) For the purposes of this Act, an organization is a declared terrorist organization if—
  - (a) it has, by a notice in force under this subsection, been declared to be concerned in terrorism; or

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<sup>191</sup> Amnesty International, “Kenya: Draft ant-terrorism legislation may undermine Kenyan Constitution and International Law,” AFR 32/004/2004/ (9 September 2004).

<sup>192</sup> Suppression of Terrorism bill 2003, Clause 8.

(b) it operates under the same name as an organization referred to in paragraph (a).

(2) Subsection (1) (b) has effect subject to the terms of any notice published under this section.

(3) The Minister may by notice published in the Gazette—

(a) declare that a specified organization is concerned in terrorism;  
or

(b) revoke any notice previously published under this section.

(4) The Minister may exercise his power under subsection (3) (a) in respect of an organization only if he believes that it is concerned in terrorism.

(5) For the purposes of subsection (4), an organization is concerned in terrorism if it—

(a) commits or participates in acts of terrorism;

(b) prepares for terrorism;

(c) promotes or encourages terrorism; or

(d) is otherwise concerned in terrorism.<sup>193</sup>

Declaring an organization to be a terrorist organization is an executive power bestowed on the minister and thus gives him wide discretion without formal or written review process for checks and balances. Declared organizations cannot challenge the minister's decision anywhere, nor can it be reviewed except by the minister himself. The clause is open to abuse especially by politicians. If the definition of terrorism is vague, then how can the criteria in Clause 9 (5)<sup>194</sup> be right? It therefore follows that these criteria will always be imprecise and subject to abuse by politicians.

Clause 10 states: “(1) A person who belongs or professes to belong to an organization that is a declared terrorist organization shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding ten years or to a fine, or both”<sup>195</sup> This clause makes it an offence to have joined an organization without prior knowledge that it was concerned with terrorism. Under 10(2) (a) and (b):

(2) it is a defence for a person charged with an offence under subsection (1) to satisfy the court—

(a) that the organization was not a declared terrorist organization on the last (or only) occasion on which he became a member or began to profess to be a member; and

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<sup>193</sup> Ibid Part III Clause 9.

<sup>194</sup> Suppression of Terrorism bill 2003, Clause 9 (5)

<sup>195</sup> Ibid., Clause 10.

(b) that he has not taken in the activities of the organization at any time while it was a declared terrorist organization.<sup>196</sup>

The onus is left to the accused to prove that at the time he joined the organization, it had not been declared a terrorist organization. Again, there is no form of redress, and the clause infringes on the freedom of association as stipulated in the ICCPR Article 22 that states: “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”<sup>197</sup>

#### **4. Law-Enforcement Powers**

##### ***a. Powers of Search and Seizure***

Clause 26 of the 2003 bill states that:

(1) Where, in a case of urgency, communication with a judge to obtain a warrant would cause delay that may be prejudicial to the maintenance of public safety or public safety or public order, a police officer of or above the rank of inspector may, notwithstanding any other Act, with the assistance of such other members of the police force as may be necessary—

(a) enter and search any premises or places, if he has reason to suspect that, within those premises or at that place—(i) an offence under this Act is being committed or likely to be committed; or (ii) there is evidence of the commission of an offence under this Act;

(b) search any person or vehicle found on any premises or place which he is empowered to enter and search under paragraph (a);

(c) stop, board and search any vessel, aircraft or vehicle if he has reason to suspect that there is in it evidence of the commission or likelihood of commission of an offence under this Act;

(d) seize, remove and detain anything which is, or contains or appears to him to be or to contain or to be likely to be or to contain, evidence of the commission of an offence under this Act;

(e) arrest and detain any person whom he reasonably suspects of having committed or of being about to commit an offence under this Act.<sup>198</sup>

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<sup>196</sup> Ibid Clause 10 (2) (a) and (b).

<sup>197</sup> ICCPR Article 22 (1)

<sup>198</sup> Suppression of Terrorism bill, 2003, Clause 26.

The clause grants police officers of the rank of inspector or above sweeping powers to enter and search places, premises, people, vessels, and aircrafts without a warrant from a judge so long as it is a case of urgency.,

Part IX clause 40, this states that:

(1) A power conferred by or under this Act on a member of the police force, customs officer or other officer is additional to powers which he has at common law or by virtue of any enactment, and shall not be taken to restrict or affect those powers.

(2) A member of the police force, customs officer or other person may if necessary use reasonable force for the purpose of exercising a power conferred on him by virtue of this Act.

(3) A member of the police force, customs officer or other officer who uses such force as may be necessary for any purpose, in accordance with this Act, shall not be liable in any criminal or civil proceedings for having, by the use of force, cause injury or death to any person or damage to or loss of any property.<sup>199</sup>

The act similarly grants sweeping powers to police officers, customs officers or other officer. A question arises, then: Who is the other officer? The bill does not specify, and thus stands open to abuse by any person who claims to be appointed by the government. Rogue government agents, and corrupt politicians can also easily collude to abuse the aforementioned powers. Furthermore, the clause also seeks to protect the government officers from prosecution regardless of circumstances thereafter.

Clause 21, which deals with seizure and detention of terrorist's cash, states that:

(1) An authorized officer who has reasonable grounds to suspect that any cash is being imported into or exported from Kenya, or is being brought to any place in Kenya for the purpose of being exported from Kenya, is terrorist property, may seize the cash

(2) An authorized officer may seize cash under this section even if he reasonably suspects part only of the cash to be terrorist property, where it is not reasonably practicable to seize that part only of the cash.

(3) An authorized officer may exercise his powers under subsection (1), whether or not any proceedings have been brought for an offence in connection with the cash concerned.

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<sup>199</sup> Ibid., Part IX Clause 40.



(4) The authorized officer shall, as soon as is practicable, make an ex parte application to the High Court for a detention order with respect to the cash seized under subsection (1).<sup>200</sup>

The clause is deficient in that it grants powers to seize cash and seek an ex parte application afterwards when it's "reasonably practicable." The problem here is that it is left to the police officer to decide what is reasonable and what is practicable when seizing cash and making an application to the High Court. It's all in the mind of the police officer; no written guidance or measures to counter check his decisions. The clause is also in violation of the African Charter on Human and People Rights (ACHPR) article 14, which states: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."<sup>201</sup> Commencing with a vague definition of terrorism and powers bestowed on a police officer without written guidance; this clause was bound to be controversial.

***b. Incommunicado Detention***

Detention for offenses related to terrorism in the 2003 bill is covered in Clause 30. The clause states as follows:

(1) Where any person is arrested under reasonable suspicion of having committed any offence under any of the provisions of Parts II, III and IV of this Act, a police officer of or above the rank of inspector may, subject to this section, direct that the person arrested be detained in police custody for a period not exceeding thirty-six hours from his arrest, without having access to any person other than a police officer of or above the rank of inspector or a government medical officer and, in any such case, that person shall be detained accordingly.

(2) No direction under subsection (1) shall be given unless the police officer has reasonable grounds to believe that the exercise of the right to consult a legal adviser—

(a) will lead to interference with or harm to evidence connected with an offence under any of the provisions of Parts II,

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<sup>200</sup>Suppression of Terrorism bill, 2003, *Clause 21*.

<sup>201</sup> ACHPR article 14 states: The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

III and IV of this Act, or to interference with, or physical injury to, other persons;

(b) will lead to the alerting of other persons suspected of having committed such, an offence but not yet arrested for it; or

(c) will hinder the tracking of, search for or seizure of terrorist property.

(3) As soon as a direction is issued under subsection (1), the person detained shall be informed that he may, if he so wishes, be examined by a government medical officer.<sup>202</sup>

The bill again grants police officers enormous powers without formal checks and balances. First, the 36 hour detention period is inconsistent with the constitution of Kenya that in article 49 clearly states that the period shall not exceed 24 hours. Secondly, the bill does not say what happens after the expiry of 36 hours. The police are left to decide whether the detainee should access a medical doctor or a lawyer. If, however, there is reason to believe that access to a lawyer will interfere with evidence under Part II, III and IV<sup>203</sup> of the bill, then, the police are allowed to deny such privileges. These powers are definitely subject to abuse as the decisions are in the minds of the police. In all other connections, presumably, the terrorism detainee could be held incommunicado. In this regard the bill also violates ICCPR provisions—in particular Article 14 (3) (b)<sup>204</sup> on equality, and Article 9<sup>205</sup> regarding the liberty and security of an individual. The bill states why a suspect is detained but does not stipulate what happens afterward. Human rights organizations cited these anomalies as gateways to torture and forced confessions. Specifically, they point at the violation of resolution 1997/38, which states that “prolonged incommunicado detention may facilitate the perpetration of torture

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<sup>202</sup> Suppression of Terrorism bill, 2003, Clause 30.

<sup>203</sup> Part II deals with terrorist offenses, Part III deals with declared terrorist organizations and Part IV with terrorist property.

<sup>204</sup> ICCPR article 14 (3) (b) state: In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.

<sup>205</sup> Ibid., article 9(1) state :( 1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

and in itself constitute a form of cruel, inhuman or degrading treatment.”<sup>206</sup> This aspect also entails the violation of ICCPR Article 7<sup>207</sup> or 10<sup>208</sup>.

*c. Immunity of Law Enforcement*

The 2003 bill states in Clause 40 (3): “A member of the police force, customs or other officer who uses such force as may be necessary for any purpose, in accordance with this Act shall not be liable in any criminal or civil proceedings for having, by the use of force, caused injury or death to any person or damage to or loss of any property.”<sup>209</sup> The clause basically exonerates the officers from all blame and shields them from any kind of criminal or civil proceedings regardless of the circumstances of the offenses. Human rights organizations such as Amnesty International had the view that these officers were thus given a blank check to torture, maim, kill, and even destroy property in the name of counterterrorism.

By ratifying the ACHPR, the Republic of Kenya agreed to adhere to all its provisions. In this case, articles 1 and 2.<sup>210</sup> It therefore follows that the Republic of Kenya is out of compliance to the provisions of ACHPR and may be held responsible by the African Union. Furthermore, the clause negates the right to redress by any aggrieved party thus violating ICCPR provisions found in article 2 (3).<sup>211</sup>

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<sup>206</sup> U N Commission on Human Rights Resolution 1997/38 Para 20.

<sup>207</sup> ICCPR article 7 states that; No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

<sup>208</sup> Ibid., article 10 that states: All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

<sup>209</sup> Suppression of Terrorism bill, 2003, Clause 40 (3).

<sup>210</sup> ACHPR Part I Chapter 1, states in Article 1. The Member States of the Organization of African Unity parties to the present Charter Shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them. Article 2 Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

<sup>211</sup> ICCPR Article 2 (3) states that: Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

**d. Extradition**

Clause 37 states that:

(1) Where Kenya is a party to a counter-terrorist convention and there is in force an extradition agreement between the Government of Kenya and another state which is party to that convention, the extradition agreement shall be deemed, for the purposes of the Extradition Acts, to include provision for extradition in respect of offences falling within the scope of that convention.

(2) Where Kenya is a party to a counter-terrorist convention and there is no extradition agreement in force between the Government of Kenya and another state which is party to that convention, the Minister responsible for foreign affairs may, by order published in the Gazette, treat the counter-terrorism convention, for the purposes of the Extradition Acts, as an extradition agreement between the Government of Kenya and that state, providing for extradition in respect of offences falling within the scope of that convention.

(3) Notwithstanding anything in the Extradition Acts, an offence which caused or was intended or likely to cause death or serious bodily harm to any person, or serious damage to any property, shall for the purposes of extradition in accordance with this section be deemed not to be an offence of a political character.<sup>212</sup>

This clause violates Article 3 of the UN convention against torture and other cruel inhuman or degrading treatment or punishment; it also violates the principles of non-refoulement. The clause seeks to extradite terror suspects to countries that are party to counterterrorism conventions and to those that are not, this happens without regard to the other state's human rights record or rights of fair trial—or the suspect's will. It does not stipulate any guarantees, legal or otherwise, of the individual's personal safety once extradited.

**5. Freedom of information and Expression**

Clause 29 of the 2003 bill states that:

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(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

<sup>212</sup> Suppression of Terrorism bill, 2003 Clause 37.

(1) A person who, knowing or having reasonable cause to suspect that a member of the police force is conducting or proposes to conduct a terrorist investigation—

(a) discloses to another person anything which is likely to prejudice the investigation; or

(b) interferes with material which is likely to be relevant to the investigation,

Shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding ten years or to a fine, or both.

(2) A person who, knowing or having reasonable cause to suspect that a disclosure has been or will be made under section 18— [which deals with cooperation with police]

(a) discloses to another person anything which is likely to prejudice an investigation resulting from the disclosure under that section; or

(b) interferes with material which is likely to be relevant to an investigation resulting from the disclosure under that section.<sup>213</sup>

Clause 29 is in breach of ICCPR Article 19<sup>214</sup> and ACHPR Article 9.<sup>215</sup> The clause deals with disclosure of information related to or connected to terror investigations. Amnesty international argues that the clause would be utilized by the police to intimidate journalists and lawyers from investigating and reporting certain activities within their line of work. The clause essentially criminalizes disclosure of such information and provides for punishment not exceeding ten years in jail.

Clause 12 was also heavily criticized by and particularly infuriated Kenyan Muslims, who complained of being unfairly targeted by the legislation. Specifically, clause 12, paragraph two states: “a person who, in a public place wears an item of clothing, or wears or carries or displays an article in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a declared terrorist

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<sup>213</sup> Ibid Clause 29.

<sup>214</sup> Ibid Article 19 states: 1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

<sup>215</sup> ACHPR Article 9 states: 1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.

organization is guilty of an offense.”<sup>216</sup> In Kenya, dressing symbolizes or expresses an individual’s pride in belonging to a certain ethnic group, religion, or culture. This section essentially gives the police powers to profile certain communities and even arrest Muslims for wearing religious garb. Having gone through two oppressive regimes of former presidents Kenyatta and Moi from 1962 to 2002, Kenyans feel that such legislation is a step backward. The clause provides for punishment not exceeding six months in jail or a fine or both.

The 2003 bill lapsed as a result of pressure from key stakeholders, thus conclusive consultations and reviews were never done. The bill was viewed as a continuation of the past oppressive regimes that sought to deal with problems with an iron fist regardless of the people’s civil liberty concerns. In the end, the critics of the bill carried the day as their concerns denied the government an opportunity to enact what was considered an oppressive and retrogressive legislation. The government, however, still held its ground and argued that in order to curb terrorism certain civil liberties must be compromised for the sake of national security.

After this debacle, the Republic of Kenya went through post-election violence in 1998 that prompted the enactment of a new constitution. The constitution established institutions (the administration and judicial oversight body and the independent police oversight authority) that are expected to protect civil liberties. The country also witnessed an increase in terror activities in the year 2011 and 2012, more so because of the lawlessness in Somali that Al Qaeda took advantage of. This situation led the government to introducing a fresh legislation for debate in the Kenyan Parliament.

### **C. ANALYSIS OF THE PREVENTION OF TERRORISM ACT 2012**

After nearly a decade of disagreement, the 2003 bill was mooted and a new bill was enacted as the Prevention of Terrorism Act 2012. This act was drafted with a careful eye toward the concerns raised by various stakeholders. As a consequence, the new act has ample safeguards for the rights of persons and entities affected in the process of

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<sup>216</sup> Kenya Gazette Supplement, *The Suppression of Terrorism Bill, 2003*, 38 Kenya Gazette Supplement Nairobi, 30 April 2003 at 443, Clause 12(2).

combating terrorism—at least in terms of those areas of contention raised by the 2003 bill. That is, without question, the 2012 act marks an improvement in the civil-liberties sensibilities of Kenya’s counterterrorism law. It is by no means a perfect document, but the progress is both welcome and vitally important to Kenya’s citizens, who value both their national security and their human rights.

The Prevention of Terrorism Act 2012 was introduced in parliament by the acting minister of state for provincial administration and internal security, Honorable Mohamed Yusuf Haji via a *Kenya Gazette* supplement No. 77 on the 27 of July 2012, following sporadic attacks by the Al Shabaab terror group. The act was drafted with regard to the concerns raised by various stakeholders regarding the 2003 bill. It addressed the following concerns:

- Broad definition of terrorism that also extended to political protests, mass action, industrial action and other forms of violence
- Declaration of an organization as a terrorist organization was without due process and open to abuse
- Absence of redress mechanism for innocent persons and entities affected in the process of combating terrorism
- Criminalization of innocent acts even where a person had no intention or motive of committing the impugned act
- Reversal of the burden of proof in that the burden of proving innocence was placed on the suspect as opposed to the prosecution contrary to the constitutional principle on presumption of innocence and other principles of criminal liability
- Wide and intrusive investigative powers of the law enforcement agencies
- Religious profiling in that the bill appeared to target a section of the society by reference to the manner of dressing
- Seizure and confiscation of property suspected to be used in terrorist acts was without due process and open to abuse
- Where incommunicado detention of suspects beyond the constitutionally recognized timeframe within which one must be brought before a court of law
- The provisions on mutual legal assistance, extra-territorial application and Extradition of suspects gave the impression of that the bill was foreign driven

The act was passed and enacted into law in October 2012. It contains six parts<sup>217</sup> (52 sections and two schedules. Though the whole act is important for analysis, this thesis will focus on the most contentious issues.

## **1. Definition of Terrorism**

The Prevention of Terrorism Act 2012, unlike the Suppression of Terrorism Bill 2003 seeks to define “acts of terrorism”<sup>218</sup> as opposed to defining “terrorism,” which is subject to many definitions. The law also applies to acts with far fewer theoretical or practical problems, particularly from a civil-rights perspective, than, say, to ideas, status, or inclinations. The definition has significant changes from its predecessor and the main areas that were affected are as follows:

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<sup>217</sup> Parts of the Prevention of Terrorism Act 2012 are as follows: Part 1 – Defines words and expressions; part 2 – Specified entities; part 3 – Terrorism offences; part 4 – Investigating offences; part 5 – Trial of offences; part 6 – Miscellaneous.

<sup>218</sup> Prevention of terrorism act 2012 Clause 2 (1)(a) states that a “terrorist act” means an act or threat of action—

(a) which—

(i) involves the use of violence against a person;

(ii) endangers the life of a person, other than the person committing the action;

(iii) creates a serious risk to the health or safety of the public or a section of the public;

(iv) results in serious damage to property;

(v) involves the use of firearms or explosives;

(vi) involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment;

(vii) interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services;

(viii) interferes or disrupts the provision of essential or emergency services;

(ix) prejudices national security or public safety; and

(b) which is carried out with the aim of—

(i) intimidating or causing fear amongst members of the public or a section of the public; or

(ii) intimidating or compelling the Government or an international organization to do or refrain from doing any act; or

(iii) Destabilizing the religious, political, constitutional, economic or social institutions of a country, or an international organization. “provided that an act which disrupts any services and is committed in pursuance of a protest, demonstration or stoppage of work shall be deemed not to be a terrorist act within the meaning of this definition so long as the act is not intended to result in any harm referred to in paragraph (a) (i)-(iv).”



- In the act, paragraph (a), sub-paragraph (vii), is more specific where it states: “interferes with electronic systems resulting in the disruption of the provision of communication, financial, transport or other essential services.”<sup>219</sup> In its predecessor it only mentions the disruption of an electronic system, which could be a small generator in the village used by a local Chief to address congregations.
- Paragraph (a) sub-paragraph (viii) has a provision on “disruption of essential and emergency services”<sup>220</sup> that is not found in the 2003 definition.
- Paragraph (b) sub-paragraph (iii); replaced one of the most controversial clauses of the bill that touched on religious, ideological, and ethnic causes. The act leaves out religious, ideological, and ethnic motives that are usually linked to terrorism. It simply means that regardless of the motive (religious, ethnic, ideological or political) as long as the perpetrators intend to cause harm as described in (a)(i)-(iv) and with the aim as tabulated in (b)(i)-(iii), the act will still be regarded as terrorism.
- After subsection (b), the 2012 act qualifies what should and should not be classified as a terror act—and expressly excludes acts committed in pursuance of a protest, demonstration, or industrial action from being regarded as terrorist acts.

The Prevention of Terrorism Act 2012 is clear and precise as compared to its predecessor. Most of its sections beginning with definition of terms to disclosure of information relating to terrorist acts are important and relevant to the detection and prevention of terrorism. Further, the stiff penalties in all the offences reflect the gravity of those offences. Detection and prevention which are sought to be achieved by the act, are very important in countering terrorism. Throughout the act, the provisions seek to instill measures to identify commencement of any terrorist activity and prosecution of individuals involved in terrorism at such stages in a bid to avert full exposure to the crime of terrorism.

Even though the act appears to be focused on the Kenyan context, provisions prosecution of individuals having committed terrorism against Kenyan citizens in other states<sup>221</sup> or planned outside the country and committed inside Kenya<sup>222</sup> makes the fight against terrorism global. This aspect serves to secure Kenyan citizens and property within the country, and outside, including other nationals in or outside Kenya. The act conforms

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<sup>219</sup> Ibid., Clause 2 (a) (vii).

<sup>220</sup> Ibid., Clause 2 (a) (viii).

<sup>221</sup> Ibid., section 21.

<sup>222</sup> Ibid., Section 38 and 21.

to constitutional requirements as tabulated in the Bill of Rights. Other safeguards have also been catered for through the judicial oversight body and the independent police oversight authority.

## **2. Terrorism Offences and Sentencing**

A number of offences relating to financing, recruitment, training, and preparations to commit a terrorist attack are laid down in Part 3. The act provides life imprisonment<sup>223</sup> for persons who carry out terrorist acts that result in the death of another person—as opposed to death sentence as provided for in the penal code. The reasons for this discrepancy that terrorist are often ready to die and imposing a death sentence would unnecessarily grant them the status of a martyr. In addition, there may be challenges in extraditing suspects to stand trial in Kenya in the event the subjects are liable to death sentence, because most countries have a bar to extraditing suspects to countries that mete out death penalties. A similar penalty<sup>224</sup> awaits leaders of terrorist groups who command their followers to cause pain, suffering, or death. Heavy jail terms await those who take part in this heinous crime. Anyone aiding the activities of terrorism,<sup>225</sup> through financial support, collection of intelligence, or through any other action will be jailed for twenty years. No fines have been created as an alternative to imprisonment. For all offences under the Act, the mode of punishment is by imprisonment. The stiff sentences are action focused and commensurate with the debilitating consequences of terrorism, and are intended to serve as deterrence.

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<sup>223</sup> Ibid., section 4 states that: (1) A person who carries out a terrorist act commits an offence and is liable, on conviction, to imprisonment for a term not exceeding thirty years.

(2) Where a person carries out a terrorist act which results in the death of another person, such person is liable, on conviction, to imprisonment for life.

<sup>224</sup> Ibid section 12 states that: A person who, being a member of a terrorist group, directs or instructs any person to commit a terrorist act commits an offence and is liable, on conviction, to imprisonment for life

<sup>225</sup> Ibid section 9 states that:

(1) A person who knowingly supports or solicits support for the commission of a terrorist act by any person or terrorist group commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty years.

All the offences under the act require a person to have positive knowledge or a guilty mind on the support or facilitation of offences under the bill as opposed to inferred knowledge. The rights to presumption of innocence and fair trial are intact. Signally, in all the offences, the burden of proof is on the prosecution and not the suspect.

### **3. Declared Terrorist Organizations (Specified Entity)**

In the 2012 act “declared terrorist organizations” was changed to specified entities. An entity according to the act is defined as: “a person, group of persons, trust, partnership, fund or an unincorporated association or organization.”<sup>226</sup> While a “specified entity” means an entity in respect of which an order under Section 3 has been made.” According to the act, Part II, Section 3,<sup>227</sup> the inspector general of police can recommend to the cabinet secretary<sup>228</sup> that an order be issued against certain entity/entities under the article. The cabinet secretary on his part if satisfied that there is reasonable grounds may go ahead and declare an entity—that is, to add it to the list of terrorist organizations. In this case only two statutory thresholds must be overcome in order to declare an organization a specified entity—the inspector general’s recommendations based on Section 3(1)(a) & (b) and the cabinet secretary’s belief. The act does not give any

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<sup>226</sup> Ibid., Part I, Preliminary, interpretation.

<sup>227</sup> Ibid., Part II, section 3 states that:

(1) Where the Inspector-General has reasonable grounds to believe that—(a) an entity has—

(i) committed or prepared to commit;

(ii) attempted to commit; or

(iii) participated in or facilitated the commission of a terrorist act; or

(b) an entity is acting—

(i) on behalf of;

(ii) at the direction of or

(iii) in association with, an entity referred to in paragraph (a), he may recommend to the Cabinet Secretary that an order be made under subsection (2) in respect of that entity.

(2) Upon receipt of the recommendation under subsection (1), the Cabinet Secretary may, where he is satisfied that there are reasonable grounds to support a recommendation made under subsection (1), declare, by order published in the Gazette, the entity in respect of which the recommendation has been made to be a specified entity.

<sup>228</sup> Cabinet Secretaries were introduced in the 2010 Constitution and are equivalent to Ministers. Kenya will no longer have Ministers but Cabinet Secretaries as from 2012 elections.

discretionary factors that must be satisfied in order to proscribe an organization. (Unlike Kenya, the U.K. has five discretionary factors<sup>229</sup> that the secretary of state follows before proscribing an organization.) Specifying an entity usually infringes on such human rights as freedom of expression and association as guaranteed by the constitution and the ICCPR.

According to the act, entities can be individuals; group of persons; trust; partnership; fund or unincorporated associations or organizations. Therefore, as per the definition of a terrorist act, a person intimidating members of the public can be declared a specified entity by the cabinet secretary, with the recommendation of the inspector general. Once an entity has been specified and gazetted, it loses the protection of the law and its activities are curtailed—even if the entity was established on legal ground and its activities are within the law. If it engages or attempts to engage in any activity forming part of a terrorist act as provided by the 2012 act, it will lose its legality. Consequently, it will lose the protection of the law.

This means that all organizations or groups in the country that have been declared illegal by law are automatically specified entities. This declaration is based on their activities, which threatened national security, intimidation to general public or sections of the general public, use of violence or threat of action involving use of violence against people, among other activities. However, as required by Article 47 of the constitution, the affected entity has recourse to administrative remedy by applying to the inspector general for revocation of the order. An entity dissatisfied or aggrieved by the decision of the inspector general can seek redress to the high court for reevaluation. The verdict is not a permanent mark against the affected entity because the decision is subject to administrative review every twelve months.

Even though the specified entity is to be accorded this opportunity, danger looms for specification of entities engaging in activities causing environmental pollution or

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<sup>229</sup> Hansard HL vol.613 col. 252 (16 May 2000), Lord Bassam tabulates the discretionary factors as follows: the nature and scale of the organization's activities; the specific threat that it poses to the U.K; the specific threat that it poses to British nationals overseas; the extent of the organization's presence in the U.K; and the need to support other members of the international community in the global fight against terrorism.

intimidating the public. This Article will be a cause of legal tussles in a bid to overturn the ruling.

#### **4. Law-enforcement powers**

##### ***a. Seizure of Property***

In regard to seizure of property as tabulated in Section 43:

(1) The Inspector-General may, where he has reasonable grounds to suspect that any property has been, or is being used for the purpose of committing an offence under this Act, seize that property.

(2) The Inspector-General may exercise powers conferred under subsection (1), whether or not any proceedings have been instituted for an offence under this Act in relation to such property.

(3) The Inspector-General shall as soon as is reasonably practicable but not later than twenty one days after seizing property under subsection (1), make an application, *ex-parte* and supported by an affidavit, to the High Court for an order to detain that property.

(4) The High Court shall not determine an application under subsection (3) unless—

(a) every person having an interest in the property has been given a reasonable opportunity to be heard; and

(b) there are reasonable grounds to believe that the property has been, or is being used for the purpose of committing an offence under this Act.

(5) Subject to subsection (6), an order for the detention of property made under subsection (4) shall be valid for a period of sixty days and may on-application, be extended by the High Court for such further period as may be necessary to enable, where applicable, the production of the property in Court in proceedings for an offence under this Act in respect of that property.

(6) The High Court may release any property seized under this section if—

(a) the Court no longer has reasonable grounds to suspect that the property has been or is being used for the commission of an offence under this Act; or

(b) no proceedings are instituted in the High Court for an offence under this Act in respect of that property within six months of the date of the detention order.

(7) No civil or criminal proceedings shall lie against the Inspector-General for a seizure of property made in good faith under subsection (1).<sup>230</sup>

The power given to the inspector general is only preservatory/temporary and does not extend to disposal or permanent deprivation of property. The inspector general is required within and not later than 21 days move to court to have the court either confirm or lift the seizure. After 21 days, only the high court can determine whether the property should still be detained by the inspector general. The court will not issue an order for detention unless:

- Every person who has an interest in property has been given an opportunity to be heard.
- It believes reasonable grounds that the property has been or is being used for related offences.

Deprivation is not permanent, as the property may be released to the owner if there are no grounds for continued detention or no forfeiture proceedings are instituted within six months. Forfeiture to the state is subject to rigorous due process.

#### ***b. Powers of Police Officers***

Section 31 states that: “a police officer may arrest a person where he has reasonable grounds to believe that such person has committed or is committing an offence under this Act.”<sup>231</sup> The powers of arrest that are vested in police officers under this article are subject to judicial oversight. The police are required to base all arrests on reasonable grounds, and the suspect is to be either taken to court or released within 24 hours as provided by the Constitution. Any continued detention has to be sanctioned by the courts of law. An area of concern is that the police are authorized to arrest without a warrant so long as they have “reasonable grounds” that an individual is about to commit/is committing or has committed an offense. These are very wide powers that can also be used to arrest (legally) individuals who might never be charged under this act.

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<sup>230</sup> Prevention of terrorism Act 2012, section 43.

<sup>231</sup> Ibid., section 31.

The officer need not have a particular offence in mind in order to arrest an individual; it's entirely based on his perception and whatever he considers a terrorist act at that moment.

***c. Detention (Remand) and Right to be Released***

In the act, the issue of detention has been rectified in Section 32 which states that:

(1) A person arrested under section 24 (referred to as the suspect) shall not be held for more than twenty four hours after his arrest unless—

(a) the suspect is produced before a Court and the Court has ordered that the suspect be remanded in custody; or

b) it is not reasonably practicable, having regard to the distance from the place where the suspect is held to the nearest Court, the non availability of a judge or magistrate, *or force majeure* to produce the suspect before a Court before the expiry of twenty four hours after the arrest of the suspect.<sup>232</sup>

The section conforms to the 24-hour detention maximum given in the constitution. Any other extension to the stipulated period requires court approval under several stringent conditions (detailed in Article 33<sup>233</sup>) and may not exceed a total of 90 days, inclusive of the initial period of arrest. The provision is in line with the Article 49 of the constitution on the rights of an arrested person.

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<sup>232</sup> Ibid., article 32.

<sup>233</sup> Ibid., article 33 states that:

(1) A police officer who detains a suspect may, where he has reasonable grounds to believe that the detention of the suspect beyond the period specified in section 32 is necessary, —

(a) produce the suspect before a Court; and

(b) apply in writing to the Court for an extension of time for holding the suspect in custody.

(2) In making an application under subsection (1), the police officer shall specify—

(a) the nature of the offence for which the suspect has been arrested;

(b) the general nature of the evidence on which the suspect has been arrested;

(c) the inquiries that have been made by the police in relation to the offence and any further inquiries proposed to be made by the police; and

(d) the reasons necessitating the continued holding of the suspect in custody, and shall be supported by an affidavit.

(3) A Court shall not hear an application for extension of time under subsection (1)(b) unless the suspect has been served with a copy of the application.

This provision is not a carte blanche for illegal detention of suspects. It has inbuilt safeguards such as:

- The officer must first produce the suspect before a court of law i.e. comply with the Constitution;
- In his application, the officer must state the reasons necessitating the continued holding of the suspect.
- A court shall not issue a remand order unless the suspect has been served with a copy of application.
- A court will only issue a remand order if there are compelling reasons for issuance of the same.
- The court orders cannot be issued in perpetuity as the suspect can only be held for up to a maximum of 90days, cumulatively.

## **5. Terrorism Financing**

Terrorism financing and money laundering are related but they have different elements. Money laundering presumes that there is a crime which generates proceeds that have to be disguised to conceal the illicit source while in the case of terrorist financing money would be from either legitimate or illegal sources. Terrorism financing was not covered by the Proceeds of Crime and Anti-Money Laundering Act 2009, because terrorism was not an offence under Kenyan laws.

However in the 2012 act, prohibition of terrorist financing is in line with the UNSC resolution 1566(2004) and the 1999 Suppression of Financing of Terrorism Convention. The imminent threat of being blacklisted by the Financial Action Task Force (FATF)/international community due to lack of legislation to criminalize terrorism and terrorist financing is over. Blacklisting would have placed the country in the same category as Iran and North Korea and would have had a devastating effect on the country's economy, especially the financial sector. The country's reputation in the international community would have been tarnished as it would have been viewed as a money laundering haven while transactions emanating from the country would have been treated with suspicion and subjected to extra vigilance. Correspondent banking relationships and growth of Kenyan banks to other regions would also have been severely curtailed while foreign investments into the country would have been severely eroded.



## **6. Communications Interception**

Section 36<sup>234</sup> allows police officers to intercept conversations subject to approval of the high court. This provision is necessary because terrorism is a complex phenomenon often involving a chain of events and players at different stages. The provision is intended to make law enforcement agencies proactive as opposed to being reactive and hence pre-empt what the terrorists are planning. Interception is a law enforcement tool acceptable in most jurisdictions. However, the power to intercept is subject to administrative and judicial oversight in the Act and has the following inbuilt safeguards:

- Written approval of the Inspector General or Director of Public Prosecutions must first be obtained
- Not every officer can exercise this power – only an officer of or above the rank of chief inspector
- It must be sanctioned by the court
- It is limited only to the investigation of commission of offences under this act i.e. terror related offences and does not extend to other penal code offences
- A court will not issue an interception order unless it is satisfied that the information sought relates to the commission of an offence under the act

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<sup>234</sup> Ibid., Section 36 state that: (1) Subject to subsection (2), a police officer of or above the rank of Chief Inspector of Police may, for the purpose of obtaining evidence of the commission of an offence under this Act, apply ex-parte, to High Court for an interception of communications order.

(2) A police officer shall not make an application under subsection (1) unless he has applied for and obtained the written consent of the Inspector-General or the Director of Public Prosecutions.

(3) The Court may, in determining an application under subsection (1), make an order — (a) requiring a communications service provider to intercept and retain specified communication of a specified description received or transmitted, or about to be received or transmitted by that communications service provider; or (b) authorizing the police officer to enter any premises and to install on such premises, any device for the interception and retention of a specified communication and to remove and retain such device.

(4) The Court shall not make an order under subsection (3) unless it is satisfied that the information to be obtained relates to—(a) the commission of an offence under this Act; or (b) the whereabouts of the person suspected by the police officer to have committed the offence.

(5) Any information contained in a communication—(a) intercepted and retained pursuant to an order under subsection (3); or (b) shall subject to the provisions of any other written law, be admissible in proceedings for an offence under this Act;

(6) A police officer who intercepts communication other than is provided for under this Section commits an offence and shall on conviction be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding five million shillings or to both.

The administrative and judicial oversight is intended to prevent the abuse of interceptions by rogue officers. The independent police oversight authority is also expected to address any grievances that may be raised on complaints regarding the abuse by police officers. Also, the fear that one may be falsely implicated by business or political rivals has been addressed by providing for stiff penalties (up to 20 years imprisonment) for giving false statements to the police under section 20.<sup>235</sup> The interception of communication includes phone tapping, internet monitoring, and house bagging among other methods. This has been argued to violate the right to privacy.

## **7. Fundamental Rights in relation to the constitution of Kenya**

As regards fundamental rights, the constitution is quite exhaustive and being the supreme law of the land, all other laws must be in tandem with the constitution to stand the test of constitutionalism. The rights and freedoms which have been limited in the 2012 Act have all passed the test of Article 24 of the Constitution of Kenya which states that:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.<sup>236</sup>

The act strives to adhere to constitutional norms and where there is a loop-hole it is covered by other existing laws. For instance, the right to a fair trial under Article 50 of

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<sup>235</sup> Ibid., section 20 states that: A person who, with intent to mislead an officer under this Act, makes a statement knowing the same to be false commits an offence and is liable, on conviction, to imprisonment for, a term not exceeding twenty years.

<sup>236</sup> The Constitution of Kenya 2010, article 24.

the constitution provides that a suspect be presented before court in 24 hours and the 2012 Act has had to abide. A suspect can only be held beyond the 24 hours if there is a court order for remand or it is not practically possible to produce the suspect before the court.

The Act has more safeguards through the criminal procedure code because a suspect who has been released under Section 32(2)<sup>237</sup> of the 2012 act cannot be re-arrested for the same offence unless there is a warrant of arrest in place and further evidence has come to light justifying the re-arrest.

#### **D. CONCLUSION**

The Republic of Kenya has progressed in its efforts to legislate terrorism from an oppressive colonial regime that installed laws without consultation to a democratic regime that seeks consultation and views from its citizens. The initial laws were heavy handed and had one aim of crushing the Mau Mau revolution. The legislation of 2003 had its own flaws, which encouraged the creation of a two-tier justice system whereby constitutional safeguards were completely negated. It sought to introduce a distinct system that only caters for terrorism offences such as arrests, detention, prosecution, and seizure of property and cash. The bill violated the rights of the individual and was inconsistent with international human rights norms. The 2012 Act on the other hand sought to fix these anomalies but has somehow left others undone. It is however a much improved legislation as compared to its predecessor more so because it addresses civil liberty concerns. The Act has also balanced national security and civil liberties where certain safeguards have been put in place to minimize the damage while protecting the people of Kenya.

This chapter has demonstrated that the process of achieving acceptable terrorism legislation in a democratic society is slow. Even though a rise in security threats act as a

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<sup>237</sup> Prevention of terrorism Act 2012, section 32 (2) states that: (2) A police officer holding a suspect under subsection (1) may release that suspect at any time before the expiry of twenty four hours on condition that the suspect appears before the Court or such other place as may be specified, in writing, by the police officer and may, for this purpose, require the suspect to execute a bond of a reasonable sum on the suspect's own recognizance.

catalyst in speeding up the process, a compromise or a tradeoff must be achieved. At the moment, this balance has been achieved in Kenya. Kenyans seem to have accepted that in order to achieve a certain level of security; a certain amount of civil liberties must be compromised. The government on the other hand must show that safeguards are in place to cover the little flaws that still seem to violate civil liberties. The act has so far been received well without too much hullabaloo. It is however a matter of time whether the democratic principles that Kenya is trying to instill will hold. To implement this legislation, the criminal justice system has to be corruption free and adhere to the laid down regulations. All in all the legislation makes Kenya a much safer place than before.

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## **V. CONCLUSION AND RECOMMENDATIONS**

The 2012 legislation is no doubt an improvement and a step toward reducing acts of terror in Kenya. The process of legislating counterterrorism is slow even though the crime violates the most fundamental right—the right to life. The slow process is occasioned by the dilemma of response. States strive to safeguard the lives of those under their jurisdiction because a social contract exists. However, a problem arises when the law compels leaders to adhere to human-rights obligations while at the same time securing their citizens' lives. The law also requires the measures implemented to fight terrorism comply with international human rights norms. At this point, the state falls back to its people for approval.

In the case of the Republic of Kenya, the government's early responses were not supported by the people. The proposed laws were rejected, even though Kenya was clearly susceptible to terror attacks, for several reasons:

- First, past oppressive regimes (including British colonial rule) had set a precedent of heavy-handedness when dealing with acts of “terror,” including a readiness to reach almost immediately for oppressive and/or extra-judicial measures. These measures also were extended to common, day-to-day crime and, of course, opponents of the ruling regime.
- Second, civil liberties have been a concern in the past, especially in the regimes of President Jomo Kenyatta and Daniel Arap Moi. Living memory in Kenya dictates that human rights and civil liberties remain central to any and all laws.
- Third, the democratization process in Kenya after the post-election violence in 2008 has been a major catalyst for change. Inherent safeguards in the 2010 constitution seem to give confidence that the rule of law will thrive.

These factors together provide the context for the ultimate failure of the 2003 counterterrorism bill and the tentative success of the 2012 act. The laws that were acceptable to the people addressed most of the controversial clauses raised in earlier legislation. Some were accepted because of the safeguards in place, such as the introduction of the Supreme Court, the judicial oversight body, and the independent police oversight authority. These safeguards, especially in a democracy, are in place to check the criminal justice system.

This thesis has demonstrated that Kenya's criminal justice system is well developed; however, when confronted with terrorism it has a tendency to violate basic civil liberties. The criminal justice system in Kenya has been static for a long time as opposed to the crime of terror that is ever evolving. Learning from the U.K., counterterrorism legislation evolves in tandem with the crime of terror. The U.K legislation has changed over time to cover new terrorist tactics there. Laws that seem overly harsh but must be part of the counterterrorism measures and are critical to civil liberty concerns are held in abeyance and have stringent conditions for activation.

The process taken by the Republic of Kenya to enact the 2012 Act has been consultative, where a majority of the stakeholders was involved. However, it is critical that the remainder of controversial clauses be streamlined, more safeguards put in place, and domestic court rulings upheld. The role of the court cannot be understated in shaping counterterrorism legislation. Unlike Kenya and other East African countries, the U.K is an established democracy that thrives on the rule of law. Court rulings are upheld and set precedence for any future litigation. In the case of Kenya it is hoped that the new judicial system will stand the test of time and will operate independently.

The balance between the branches of the government plays a vital role in securing civil liberties. This thesis has demonstrated that the judiciary (like in the case of U.K.) is vital; the courts check and balance the process constantly; scrutinize all measures that are likely to infringe on civil liberties while at the same time authorises and reviews laws that are not in line with constitutional and human rights norms. The executive has powers that are either held in abeyance or are subject to parliamentary oversight. A good example in the U.K is the aspect of declaring an entity where discretionary factors have been set by Parliament and must be met before an organization is declared.

In regard to Kenya's neighbouring countries such as Uganda and Tanzania, the compatibility of civil liberties and counterterrorism legislation is still at question. This has the potential of undermining democratic principles gained over the years. It is therefore incumbent upon these states to balance the response with civil-liberty concerns, and more so to check executive powers, coupled with judicial and legislative oversight.

The preference for security over civil liberties has the tendency of leading states to other violations not related to terrorism.

Finally, this thesis opines that a nuanced balance must be achieved between civil liberty and security. The measures implemented in Kenya will have an effect on civil liberties, however miniscule. This balance is hard to achieve but with mechanisms in place to check and countercheck security and other government apparatus, it is expected that civil-liberty concerns can be reduced. An area of future research in East Africa would be the viability of human rights courts considering how fluid politics are in Africa.



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